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## P R E F A C E.

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THE Author regrets that this book is of a more bulky nature than he intended or desired. Its proportions, however, were not discovered until the greater part was in print: any effectual process of cutting down would at that stage have involved considerable expense, and it would have been necessary to make a substantial addition to the price of the book. The Author preferred, under these circumstances, to let the work stand as it was, hoping that by the method of arrangement, and the very full system of cross-references, it might be found as convenient to consult as a smaller book.

The Author's object has been, as far as possible, to make it a complete and comprehensive work on Discovery.

The old practice of Discovery in Chancery and at common law is considered, in greater or less detail, as it is impossible to say that this practice may not have a considerable bearing on questions which may arise under the present practice.



The cases have been cited more fully than is usual, in order that, as far as possible, the necessity of consulting the actual authorities may be dispensed with, or, at all events, that it may be limited to such as are seen to be really germane. An elaborate (in some cases over-elaborate) system of cross-references has been adopted, in order to bring together all the matter that fairly bears on any particular point.

The general method of arrangement will be best seen by turning to the Table of Contents.

The decision in the important case of *Kennedy v. Lyell* in the C. A. not having been yet reported in the Law Rep., it has been necessary to rely on the report in the Law Times. Portions of the judgments are given *ipsissimis verbis* on p. 393: it is hoped that the authorized report will not substantially differ.

The Author is conscious that in some cases he may have ventured on too confident an expression of opinion.

E. B.

November, 1884.

## EXPLANATORY NOTICE.

MICHAELMAS TERM, 1885.

SOME passages having seemed on re-consideration to require modification, and some cases of importance having been decided during the past year, the Author has re-written some pages, and also incorporated the recent cases.

Arrangements have been made by which all holders of existing copies can have them "converted" by leaving them at the Publishers, Messrs. REEVES & TURNER, and on payment of 1s. The Author hopes that this may prove a convenience to members of the profession.

E. B.

The following cases of the year are discussed in the text:—

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The following cases are not discussed in the text, but references are given to the pages where the subjects are treated:—

*Cardwell v. Tomlinson*, 52 L. T. 746 (where the plaintiff was unable, owing to his state of health, to make an affidavit of documents and answer interrogatories, Bacon, V.-C., refused to dismiss the action, and allowed his brother to be added as next friend, partly, apparently, for the purpose of giving the discovery) .....pp. 65, 588

- Coney v. Roddey**, not reported (application to stay proceedings until one of two trustees, co-plaintiffs, who had left the country, and could not be found, had complied with an order for an affidavit of documents, refused by the Court of Appeal, for it was in reality an attempt to get the action dismissed) ..... pp. 87, 88, 588
- Foakes v. Webb**, 28 Ch. D. 287: 51 L. T. 624 (held, that it was no answer to a plaintiff's interrogatory, asking as to interviews and correspondence between the solicitors of the defendants and his own, to say that they had no personal knowledge, and that the only information they had was derived from confidential communications from their solicitors in reference to their defence to this action, for it was a fact so outside the relation of client and solicitor that it could not be the subject of a confidential communication) ..... 434
- Harvey v. Lovekin**, 10 P. D. 122 (the Probate, Divorce and Admiralty Division has, by virtue of sects. 16 and 23 of the Judicature Act, 1873, all the powers of discovery possessed by the old Courts of Chancery, Common Law, Admiralty, Probate and Divorce, which were absorbed into the High Court of Justice, and, in particular, the power of giving leave to administer interrogatories. In divorce and matrimonial causes the Court has the old powers of discovery possessed by the old Ecclesiastical Courts, and, in particular, of administering interrogatories. *Semble*, that a registrar has no power to give leave to interrogate: only a judge; for divorce and matrimonial proceedings are by Ord. LXVIII. r. 1, excepted from the Rules of the Supreme Court) ..... 561—564
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- Rawstone v. Corporation of Preston**, 33 W. R. 795: 52 L. T. 922 (Kay, J., took the same view as to shorthand notes as that advocated in the text on p. 398, and refused to protect shorthand notes of the evidence and speeches of counsel at an arbitration "taken and transcribed at the plaintiff's sole expense in anticipation of ulterior proceedings against the defendants then contemplated, and for the purpose, amongst others, of submitting them to the solicitors and counsel for their advice in relation to this action") ..... 398
- Wickstead v. Briggs**, 29 S. J. 339 (where the plaintiff had obtained judgment with costs, his costs of notices to the defendant's solicitor to inspect, of attendances at his office to inspect, and of attendances to inspect at the office of the plaintiff's solicitor, were disallowed on party and party taxation. Ord. LXV. r. 27 (17), applies only to costs as between solicitor and client) ..... 176

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# DISCOVERY.

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## INTRODUCTORY CHAPTER.

### I. *Definition or Function of Discovery.*

THE right of discovery is the right by which a party to some proceedings (actually commenced or contemplated) before a civil court is enabled, before the determination of any matter in question in those proceedings, to extort on oath from another party to those proceedings—(1) all his knowledge, remembrance, information and belief (of facts: *Redes. Pl. 34: Spence, Eq. Jur. 677: Flight v. Robinson, 8 Beav. p. 33: not of matters of law: see post, p. 115*) concerning the matter so in question; (2) the production of all documents\* in his possession or power relating to such matter.

However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes or thinks in relation to the matters in question: *Flight v. Robinson, 8 Beav. p. 34*. In fact, one of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him: see next section.

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### II. *The Object or Scope of Discovery.*

A party was entitled to discovery in order to ascertain facts material to the merits of his case, either because he could not

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\* The inspection of property, though theoretically, perhaps, a function of discovery under some circumstances, is discussed separately: *post, Bk. III. Ch. VI.*

prove them, or in aid of proof and to avoid expense: *Redes. Pl. 307, 9: Finch v. Finch, 2 Ves. p. 492*: to deliver him from the necessity of procuring evidence: *Montague v. Dudman, ibid. p. 397*: to supply evidence or to prevent expense and delay in procuring it: *A.-G. v. Duplessis, Park. p. 164: A.-G. v. Gaskill, 20 Ch. D. pp. 528, 531*: to save expense and trouble: *Chadwick v. Chadwick, 22 L. J., Ch. p. 330: A.-G. v. Gaskill, p. 527*: to prevent a long enquiry and to determine the action as expeditiously as possible: *Hall v. L. & N. W. R. Co., 35 L. T. p. 850*: whether he could prove them aliunde or not: see *post, p. 299*: to facilitate proof or save expense: *Grumbrecht v. Parry, 32 W. R. p. 204*: and see *post, Bk. III. Ch. X. as to bills of discovery.*

Discovery is not limited to giving the plaintiff a knowledge of that which he does not already know (and see *Bustros v. White, 1 Q. B. D. p. 427*), but includes the getting an admission of anything which he has to prove on an issue between himself and his opponent: *Cotton, L. J., in A.-G. v. Gaskill, p. 528*: and see *Hodsoll v. Taylor, L. R., 9 Q. B. pp. 82, 83; Glengall v. Frazer, 2 Ha. p. 104*: so as to relieve him of, or diminish the burden of, proof: *A.-G. v. Gaskill, pp. 527, 528*: to get an admission from the opponent of the case made against him: *Redes. Pl. 9.*

Discovery may even be required which will prove the whole cause of action; for instance, the fact of seduction in an action for seduction: *Hodsoll v. Taylor*: and see *Acheson v. Henry, I. R., 5 O. L. 496, cited post, p. 95*: and *McFadzen v. Liverpool, cited post, p. 320*. So a bill of discovery would lie to discover a promise of marriage: *Vaughan v. Aldridge, Forrest, 42.*

It may be noted that under the new rules (Ord. XXXII. R. S. C.) one party to a cause or matter may call on any other party to admit, for the purposes of the cause, matter or issue only, any specific facts; and under Ord. XXXI. r. 2, in deciding upon any application for leave to interrogate (see *post, p. 91*), the judge is to take into account any offer to make admissions.

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### III. *The Character of the Proceedings in aid of which Discovery is given.*

The right of discovery exists only in aid of civil proceedings.

Not in aid of an action founded on a felony: *Cartwright v. Green*, 8 Ves. 405, p. 408.

If a bill brought for relief against a proceeding at law upon a criminal prosecution, as an indictment or information, or a mandatory writ, or a writ of prohibition, a mandamus, or any writ which is mandatory and not remedial, the defendant may demur: *Redes*. Pl. 133, citing *Montague v. Dudman*, 2 Ves. 398: *A.-G. v. Reynolds*, 1 Eq. Ca. Ab. 131: *A.-G. v. Cleaver*, 18 Ves. 220: and so equally it is conceived would a bill of discovery in that behalf have been demurrable. In *Montague v. Dudman*, Lord Hardwicke said: "A bill of discovery lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid the proceedings in some suit relating to a civil right in a court of law, as an action, but not to aid the prosecution of an indictment or information, or to aid the defence to it. It is said this is a mandamus to compel the holding a court, but this court has nothing to do to aid the discovery upon that." But a mandamus to enforce a civil right: *R. v. Ambergate R. Co.*, 17 Q. B. 957: and see *R. v. Cadogan*, 5 B. & A. 902: 1 D. & R. 550: and an information in the nature of a quo warranto: *R. v. Shelley*, 3 T. R. 141: *R. v. Babb*, *ibid.* 582: *R. v. Purnell*, 1 Wils. 239: W. Blackst. 45: *R. v. Trevannion*, 2 Chitt. 386: have been regarded as civil proceedings: see *Tayl. Evid.* p. 1264: but see *A.-G. v. Reynolds*, *post*, p. 312. Proceedings in the Divorce Court are civil: *Branford v. Branford*, 4 P. D. 72: *Mordaunt v. Moncrieffe*, L. R., 2 H. L. Sc. 374.

As to discovery in aid of the defence to a bond or contract on the ground of its illegal or immoral nature.

Where a defendant had a good defence to an action at law or a suit in equity, founded upon the immoral, or otherwise illegal, nature of the bond or contract, the subject of the action or suit, he had a right in a court of equity to a discovery in support of that defence, though a bill for relief (and discovery in aid) founded on such a bond or contract was demurrable, the distinction being that in the one case the law would not enforce a bond or contract of such a nature, and, therefore, a defence put in for the purpose of showing it to be of such a nature was sanctioned; but in the other case, equity would not assist the party in seeking relief from such a bond or contract: *Benyon v. Nettlefold*, 3 M. & G. 94, pp. 102—104: reversing, *ibid.* 13 Jur. 798, where Shadwell, V.-C., had recognized no distinction between the interference of a court of equity for relief and for discovery in such a case.

A passage in the judgment of Lord Loughborough in *Franco v. Bolton*, 3 Ves. pp. 371, 372, was referred to by Lord Truro in *Benyon v. Nettlefold*, as apparently negating the right to discovery in such a case, but was explained by him as being founded on the fact that the discovery would, in that case, have exposed the party to penalties (as an ecclesiastical offence, see *post*, p. 342), the defendant there being the woman herself, and not, as in *Benyon v. Nettlefold*, a mere trustee of the bond. It may, however, be noted that Lord Loughborough, at p. 372, says: "The plaintiff has no right to call upon her to discover that turpitude which is common to him and her." The suit was against a woman for relief, namely, delivery up of a bond given to her for an immoral consideration, on which she had already recovered a verdict at law, the plaintiff having put in a plea in the action to that effect,

but having been unable to support it. The suit was held demurrable, partly on a technical ground, not necessary here to be considered. Mr. Hare (Hare, p. 118) refers to this case as an authority for the proposition that discovery would not be granted upon an immoral contract; but he adds, that where the bill is merely for discovery, it may, perhaps, be doubtful how far any objection on these grounds could be sustained, if they did not also constitute an objection at law.

Equity would not give discovery in aid of an action which was contrary to public policy: Hare, p. 118, citing *King v. Burr*, 3 Mer. 693 (bill of discovery in aid of action to recover expenses incurred under a contract of such a nature).

It would give no assistance to discover in prejudice of the king's charter: *Brooks v. Bradley*, 2 Ch. Ca. 95 (bill to discover goods taken by the defendant out of the plaintiff's ship, the defendant pleading authority for the act under a charter empowering a company to seize ships and goods of any person infringing their trade monopoly).

See as to discovery in aid of actions to enforce a penalty or forfeiture, *post*, p. 345.

See as to actions for tort and the old equity practice in that respect, *post*, p. 346.

#### IV. *The Old (A.) and Present (B.) Practice of Discovery.*

##### (A.) *The Old Practice.*

Originally the common law courts (except the Court of Exchequer, on its equity side, prior to 5 Vict. c. 5), possessed no general powers of enforcing discovery, but only certain very limited powers of ordering inspection of particular documents, under particular circumstances, and in favour of particular persons, (1) under the practice of *profert and oyer*; (2) under what was called their equitable jurisdiction (as to these powers see *post*, p. 264); (3) of documents of a public character, such as court rolls, corporation documents, &c., by way of *mandamus*, or by a rule in the action itself (see as to this *post*, p. 281). It was only through the medium of the Court of Chancery that any general right of discovery could be exercised. A party, therefore, to an action at common

law was, as a rule, obliged to come into chancery if he wished to get discovery, and to file a bill for the sole purpose of getting it. The jurisdiction to give discovery in chancery to sustain an action at law seems to date back as far as Henry VI.: Sp. Eq. Jur. I. p. 678.

In chancery, on the other hand, discovery was of the very essence of the bill. Every bill for relief in equity was, in reality, a bill for discovery: Redes. Pl. 53: it generally required the defendant's answer on oath: Redes. Pl. 9: Hare, p. 1.

By 14 & 15 Vict. c. 99, and the Common Law Procedure Act, 1854, powers, extensive indeed, but (and see *Aste v. Stunmore*, 13 Q. B. D. pp. 329, 330) differing widely (in practice) from those exercised in chancery, were conferred upon the courts of common law. The sections of these acts dealing with discovery are set out *post*, App. Ch. II.: and references are there made to the various pages where the practice thereunder is discussed. J

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### (B.) *The Present Practice.*

The practice of discovery in every (see *post*, Bk. III. Ch. III. specially as to the Admiralty, Probate and Divorce Division) division of the High Court of Justice is now regulated by the Jud. Act, and the orders and rules made thereunder.

The authorities cited *post* in this section seem to show, (1) that the orders and rules are to be administered on chancery principles; (2) that where they make no provision the chancery, as well as the common law, practice survives; (3) that where these practices directly conflict the chancery practice is to prevail.

In framing these rules (the original rules of Ord. XXXI.) the extended principles of the Court of Chancery were followed rather than the narrower practice of the courts of common law (under the C. L. P. Acts), though that was

itself derived from the practice in equity: Brett, M. R., in *Jones v. Montevideo Gas Co.*, 5 Q. B. D. p. 558.

In *Parker v. Wells*, 18 Ch. D. p. 485, Brett, M. R., observed that there having been a difference between the rules in chancery and at common law, it was the intention of the Judicature Act and Rules to introduce a new intermediate practice, and, in *Bolckow v. Fisher*, 10 Q. B. D. p. 168, that the questions (that is to say of practice, not of principle) arising as to interrogatories and discovery were governed, not exclusively by what was the practice in chancery, or exclusively by what was the practice at common law, but by the rules under the Judicature Acts; and see the same judge in *Jones v. Montevideo Gas Co.*, p. 558, and *Kearsley v. Phillips*, 10 Q. B. D. p. 466: and see Bowen, L. J., in *Aste v. Stunmore*, 13 Q. B. D. pp. 329, 330.

But where no provision is made by the act or rules the old procedure and practice remains in force: see note to old rules (and Jud. Act, 1875, s. 21: and Ord. LXXII. r. 2 of the new rules, providing that where no provision is made by the acts or these rules the present procedure and practice remains in force) cited by Jessel, M. R., in *Church v. Wilson*, 9 Ch. D. p. 554; and not only the chancery procedure and practice, except so far as it is altered by express rules: see Jessel, M. R. in *A. G. v. Gaskill*, 20 Ch. D. pp. 525, 526: Lindley, L. J., *ibid.* p. 530; but also the common law procedure and practice where it does not actually conflict with the chancery procedure and practice (see next paragraphs as to conflicting rules), for instance, the clauses of the C. L. P. Act (but now repealed, 46 & 47 Vict. c. 49), where they do not conflict with the rules of equity: see Jessel, M. R., in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 654: or where it is more convenient: see *Newbiggin, &c. Co. v. Armstrong*, 13 Ch. D. 310: and see the next paragraphs. "The right to discovery is conferred in affirmative terms and in such manner as not to exclude all other modes of discovery. The preface to the rules declares this in the most explicit words, and I may say, as chairman of the original committee which framed the rules, that I knew at the time, and every other member of the com-



mittee knew, that a very large body of practice was left unprovided for by the rules :” Jessel, M. R., in *China Steamship Co. v. Commercial, &c. Co.*, 8 Q. B. D. p. 145, referring to *West of England, &c. Bank v. Canton Insurance Co.*, 2 Ex. D. 472 : and see *Cooke v. Oceanic Steam Co.*, W. N. 75, p. 220, referred to *post*, p. 84.

Where there is any conflict or variance between the rules of common law and equity with reference to the same matter, the rules of equity are to prevail : Jud. Act, s. 25, sub-s. 11, cited by Jessel, M. R., in *Bustros v. White*, 1 Q. B. D. p. 426, and *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 654 : by Mellish, L. J., *ibid.* p. 658 : and Baggallay, L. J., in *Bolckow v. Fisher*, 10 Q. B. D. p. 166. And by rules are meant rather rules of law than of mere practice, for in *Newbiggin, &c. Co. v. Armstrong*, *ante*, it was laid down that in cases of variance the more convenient practice should be adopted. In a question of principle affecting the production of documents, Brett, M. R., in *Kearsley v. Phillips*, 10 Q. B. D. p. 466 (see *post*, p. 194), held that the court was bound to look at the decisions in chancery to ascertain the principles on which it should act. Grove, J., referring to the section, and in particular the word “generally,” said that it had never been decided to what extent the practice in chancery with respect to interrogatories was to prevail, and that he could find no case deciding that they were literally and absolutely bound by the chancery practice : *Dalrymple v. Leslie*, 7 Q. B. D. p. 7 (see *post*, p. 131, as to the question in this case).

It is only when the rules of law and equity conflict or are at variance in reference to the same matter that the rules of equity are to prevail. It can never have been the intention of the Jud. Act that equity principles and practice of discovery should be pitchforked into every common law action, or should govern the production of documents of a character, under circumstances of a nature, altogether different from those contemplated or obtaining at equity. Where the equity practice (and see *Newbiggin, &c. Co. v. Armstrong*, *ante*, as to rules of practice) is practically silent, there is no reason why it should be imported so as to override the common law prac-

tice on those points. In applying the rules of Ord. XXXI., the different natures of common law and chancery actions have been taken into account: see *Mercier v. Cotton*, 1 Q. B. D. p. 442: *A. G. v. Gaskill*, 20 Ch. D. p. 530, and *post*, p. 95. But the rule as to interrogatories and discovery is the same in chancery and common law actions: Brett, M. R., in *Bolckow v. Fisher*, 10 Q. B. D. p. 168.

The Jud. Act was only one of procedure, and was not intended to alter the rights of the parties: *Lyell v. Kennedy*, 20 Ch. D. pp. 489, 491: *Kearsley v. Phillips*, 10 Q. B. D. p. 466: *Hunnings v. Williamson*, *ibid.* p. 459.

In *Lyell v. Kennedy*, 8 App. Cas. pp. 233, 234, Lord Fitzgerald considered that, so far as discovery and administering interrogatories were concerned, the rules did make an alteration as to what had been called "right;" for example, that equity would not enforce discovery in aid of an action in respect of a mere tort, whereas, under the present procedure, a plaintiff in such an action might obtain such discovery: (on which it may be observed that though that is so, he might equally have obtained it under the C. L. P. Act: see *post*, pp. 346—347: it is not, therefore, an instance of a new right conferred by the Judicature Act): the learned baron also doubted whether an increased power to exhibit interrogatories to the defendant, and enforce discovery as to the plaintiff's title, or vice versâ, was an interference with the right of the parties interrogated, or was more than an alteration of procedure, for that since the passing of the Evidence Amendment Acts making all parties competent witnesses, there could hardly be a right in any litigant to refuse to answer proper interrogatories where he was liable to be called as a witness and examined *vivâ voce* to the same matters, and he considered that the intention of the Judicature Act and Rules was to give the litigant in all cases a right to interrogate his adversary as to every relevant matter on which he could examine him, if he thought fit to call him as his witness at the trial of the cause.

The right of discovery under the present (that is to say, the old rules before they were altered in 1883) Rules of the Supreme Court is not, in principle, more extensive than it formerly was in the Court of Chancery: Lord Selborne in *Lyell v. Kennedy*, 8 App. Cas. p. 223. But *qu.* whether the rights under the Judicature Act are to be limited to those existing in chancery. In the same case in the Court of Appeal, pp. 488—491, Jessel, M. R., and Brett, L. J., considered (citing *Horton v. Bott*, 2 H. & N. 249) that the C. L. P. Act, 1854, was only an enactment as to procedure, and was not intended to affect rights, p. 490; that the procedure thereby provided was a mere substitute for the old procedure in equity, p. 488; that it conferred no powers of

discovery which were not possessed by courts of equity, p. 490, and that if the right did not exist in equity before the passing of that act it did not exist at all; or, in other words, that the right to administer interrogatories stood exactly on the same footing as the right to file a bill of discovery, p. 489. This statement, however, must be qualified in some respects. In administering the powers conferred upon them by sects. 50 and 51 of the C. L. P. Act, 1854 (and, in the opinion of some judges also, by sect. 6 of the C. L. P. Act, 1851), the judges considered that they were not bound by the practice in equity: see the judgments of Brett, M. R., and Coleridge, C. J., in *Hill v. Campbell*, L. R., 10 C. P. 222, and *post*, p. 460, n.: though they were by the principles: *Pye v. Butterfield*, 5 B. & S. p. 837: 34 L. J., Q. B. pp. 19, 20: and one respect in which they thought themselves at liberty to diverge from this practice was clearly a matter of right and not of mere procedure, namely, the practice of allowing discovery to a plaintiff in an action for personal tort: see *post*, p. 347, and *ante*: and this right has survived the Jud. Act, see *post*, p. 347.

The rights of discovery under the present procedure are therefore, it is conceived, not merely the rights which formerly existed in chancery, as expressed in the above cited dictum of Lord Selborne. Wherever a party would have had a right to discovery according to the law and practice before the Jud. Act, either at equity or at common law (and whether under the C. L. P. Acts, or under profert and oyer, or the common law equitable jurisdiction: see *post*, p. 264, or under the practice relating to documents of a public character: see *post*, p. 281), it is conceived that he would have a right to discovery under the present procedure. And this seems to have been the view taken by Watkin Williams, J., and Mathew, J., in *Hunnings v. Williamson*, 10 Q. B. D. p. 464, though at another stage of the case Manisty, J., and Stephen, J., pp. 460—462, seem to have tested the right to discovery in the action (for penalties, see *post*, p. 345) by reference only to the chancery practice.

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Discovery could and can still be enforced in separate proceedings instituted for the sole purpose of obtaining the discovery. But now that every division (see *post*, Bk. III. Chap. III. as to the Adm., Prob. and Div. Division) of the High Court of Justice possesses equal powers of compelling discovery in the proceedings before it, an action for discovery will be of rare occurrence: see *Reiner v. Salisbury*, 2 Ch. D. 378: *Orr v. Diaper*, 4 Ch. D. 92: *Bustros v. White*, 1 Q. B. D. p. 426: and Bk. III. Ch. X. It was held, by Lush, L. J., in *Ramsden v. Brearley*, 33 L. T. 322, that the effect of sub-s. 7 of sect. 24 of the Jud. Act was to give jurisdiction to the court, before whom a cause or matter was pending, to order in that cause or matter all discovery in aid of the claim or defence which could, before the act, have been obtained by a bill of discovery; as, for instance, a bill of discovery under 6 & 7 Will. 4, c. 76, s. 19, relating to newspaper libels (as to which, see *post*, p. 330).

Actions for discovery alone are considered *post*, in Bk. III. Chap. X.

The main portion of this work deals with the right to require, and the obligation to give, discovery where it is sought in the proceedings for the purpose of which it is required.

Discovery may be had for the purpose of proceedings other than actions: see *post*, Bk. III. Chap. V.: and, after decree or order, in an action as well as before decree or order: see *post*, Bk. III. Chap. IV.: it may also be had for the purpose of interlocutory applications: see *post*, p. 162. But the principal use of discovery is in an action, and in view of the hearing or trial.

## BOOK I.

### THE RIGHT OF DISCOVERY IN AN ACTION.\*

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#### CHAPTER I.

##### THE EXTENT OR SCOPE OF THE RIGHT.

IN an action for relief the court has power to enforce in favour of a party to that action from an opposite party (see *post*, Chap. III. Sect. II. (p. 57), as to whether or to what extent from any party) all discovery relating to any matter in question between them (see *post*, Chap. III. Sect. II. (p. 59), as to whether or to what extent between himself and another party) in that action.

A party to an action for relief is entitled as of right (note on next page) to have from the opposite party in that action all (subject to established exceptions, see *post*, p. 309) discovery material for the determination of any matter in question certainly about to come on for trial between them in that action.

In Wigr. the principles are laid down in the form of the two following propositions:—"The pleadings in a cause and rules of practice unconnected with the laws of discovery determine a priori what question or questions in the cause shall first come on for trial: and the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause, which according to the pleadings and practice of the courts is or are about to come on for trial. It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery on oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." And in a note it is added that the result of the observations on the first two propositions is, that it is the right of a plaintiff to have every question in the cause as it comes on for trial tried upon a full answer express or implied.

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\* "Action shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the crown:" Jud. Act, s. 100.

These propositions have been departed from, for the following reasons among others: Firstly, the expressions "plaintiff" and "bill" are inapplicable to the present procedure. A defendant to an action is not now obliged to turn himself into a plaintiff, and file a bill in order to get discovery. Secondly, it is desired to emphasize more markedly the distinction between discovery required for the determination of an issue about to be tried, and that required only if the party succeeds in that issue, whether as being part of the relief sought, or as assisting him in his decree, or whether as being required for the determination only of some secondary issue. Discovery of the former kind is the party's absolute right: \* discovery of the latter kind may be for the time being withheld at the court's discretion. Under the old chancery practice, as will be seen (*post*, Chap. II.), the distinction between these two kinds of discovery, though recognized in principle (see Wigr. Pl. 90), could not be carried into practical effect with the same freedom as is possible under the present procedure, unless the defendant were able by demurrer or plea to arrest the trial of the secondary issues, or the other matters to which the discovery related.

In the second of the propositions in Wigram cited above, and also in his third proposition cited *post*, p. 444, it will be observed that the learned author determines the relevancy of discovery by reference to the case of the party seeking it, rather than by reference to the matters in question in the action: and he gives (in pl. 314) as his reason for doing so that he may by contrast exclude those cases to which the party's right to discovery does not extend, namely the evidences exclusively relating to the opponent's case. It is, however, plain from the general scope of the book (see pl. 299 for instance) that the meaning which he attaches to the expression "the party's own case" is not in principle different from that of the expression "matter in question in the action" here adopted. It must also be remembered that under the chancery practice a plaintiff *ex necessitate rei* had to deliver his interrogatories before the defence was put in, and therefore their relevancy could only be referred to the plaintiff's statement of his case in the bill (and see further as to this point, *post*, pp. 15, n., 35, 96, and specially in connection with the old defence of a pure affirmative plea). Under the present practice interrogatories are ordinarily delivered at any time up to the close of the pleadings (and even afterwards under special circumstances), and in determining their relevancy reference may and should be made to all the pleadings then in existence and the matters thereby put in question. See further as to what are the matters so put in question and the party's right to discovery relating thereto, *post*, pp. 464, 500. No doubt the plaintiff's case under such circumstances is not confined to the statement in his bill, but embraces all his pleadings, as pointed out in Wigr. Pl. 95 (and see note to Redes. Pl. 244) in reference to the old common law pleading (and see further, *post*, p. 35). Still, on the whole, the expression seems more appropriate if

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\* The necessity of applying for leave to administer interrogatories under the present rule 1 of Ord. XXXI. (see *post*, p. 90), is not intended, it is conceived, to take away the *prima facie* right of the party to discovery, but only to prevent the opposite party from being harassed with interrogatories which are really not required for the purpose of justice (see *Aste v. Stunmore*, *post*, p. 92, and the cases under this rule, *post*, pp. 92, 93). An order for an affidavit of documents was under the old rule a matter of course if the stage of action were proper: and *qu.* whether not equally under the present rule, but see *post*, p. 156. And see as to the party's absolute right to production of all relevant documents under those rules, and in chancery before the Judicature Act, contrasted with the discretionary power of the judge under the C. L. P. Acts, Jessel, M. R., in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 654: *Bustros v. White*, 1 Q. B. D. pp. 425, 426: and *post*, p. 152. In chancery, discovery was technically as of right: see Wigr. Pl. 86, 89.

not more correct. It is also the expression used in rules 1, 12 and 14 of Ord. XXXI.: see *post*, App. Ch. II. Sect. 19 of the Ch. P. Act directed that the relevancy of a defendant's interrogatories, where founded on a concise statement, should be determined by reference to the statements in the bill and the defendant's answer thereto. In sects. 18 and 20 of that act (production of documents) the expression was "relating to any matter in dispute in the suit"; in sect. 6 of the C. L. P. Act, 1851 (inspection) "relating to such action; in sect. 50 of the C. L. P. Act, 1854 (discovery and inspection) "relating to the matters in dispute" (see all these sections, *post*, App. Ch. II.).

Further, the expression more naturally includes two undoubted provinces of discovery, namely, the right which a party has to make his opponent pledge his oath to the truth of his case by the machinery of discovery (see *post*, p. 448), and the right which he has to discovery of matter for the purpose of defeating or repelling his opponent's title or case, see *post*, p. 458.

See also *post*, pp. 18—19, 483, as bearing on this question.

In the common law courts the habit of referring the relevancy of discovery to the party's own case tended in many cases to undue restriction of the right to discovery (see *post*, pp. 460, 511), and in one case to the suggestion of a proposition involving a total misconception of the practice of discovery, namely, that a document which exclusively evidenced the opponent's case was irrelevant: *Adams v. Lloyd*, 3 H. & N. pp. 364, 367.

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### I. *General Considerations as to the Stage of the Action at which Discovery can be required.*

To a question of pure law no discovery can obviously be relevant. It is only, therefore, where there is some question of fact in dispute that discovery can possibly be required.

Now, if it is impossible to say what matters of fact will be in question in the action, or if there is no matter of fact about to be in question in the action at all, it would seem to follow logically that no discovery of any kind can be had. And this is so generally in practice. Until statement of claim (in an action which requires a statement of claim) delivered (and sometimes even until statement of defence) it is generally impossible to say whether any matters of fact will ever be in question at all, or at any rate in what precise shape they will be presented. There will therefore generally be no right to discovery (by a plaintiff and of course not by a defendant) at that stage of the action: see as to interrogatories *post*, p. 96: as to documents *post*, pp. 159, 160.

Another light in which the objection to discovery being required at this stage has been regarded, is that the right to discovery is limited to supporting a definite case set up, and does not extend to fishing out a case from the opponent; and



therefore a party cannot have discovery before he has stated his case, whether in the claim as plaintiff or the defence as defendant: see *post*, pp. 16, 98, 161, 461: and p. 37, citing Fry, L. J., in *Whyte v. Ahrens*.

Again, the claim or defence when put in may be open to objections on the face of it. Objections of this kind, although directly to the form or nature of the action or the defence to it, will be indirectly effectual to destroy or suspend the right of the plaintiff or defendant, as the case may be, to discovery of any kind, for they operate to prevent for a time or altogether the putting in question of any matter of fact.

Now, under the old chancery practice, the discovery given by a defendant was combined with his defence to the action, and formed practically a part of the pleadings under the name of the answer. In any treatise on discovery, therefore, it was essential to enter somewhat fully into the rules of pleading. And further, the only ways in which any preliminary issues of law or of fact could be raised were by demurrer or plea. Such was the technical strictness of procedure, that if once these stages were passed by, and a party submitted to answer, it was held that he must answer fully, that is, to the whole bill. If a party wished to say, "There is a preliminary point which must be decided in your favour before you are entitled to put me on my defence in respect of this issue and get discovery in relation thereto," he could in strictness only say so on demurrer or plea. When once the stage of answer was reached, all issues stood on the same footing; none could be classified as preliminary: see Wigr. Pl. 44, 48—52, 266: *Lancaster v. Evors*, 1 Ph. 349: *Swinborne v. Nelson*, 16 Beav. p. 427: *Taylor v. Milner*, 11 Ves. 42: and see *post*, p. 30. Under the present procedure discovery is separated entirely from the pleadings, and facilities are afforded by the rules of the Jud. Act for raising preliminary issues, both of law and fact, at various stages of the proceedings, and postponing all discovery not required therefor: see *post*, Chap. II. Although, therefore, undoubtedly the effect of interposing at an early stage a valid objection to the raising of the issues of fact

which it is attempted to raise is to escape altogether, or temporarily, the obligation of giving discovery in relation thereto, and therefore may, in a sense, be regarded as an objection to discovery, any consideration of the practice on these points would be outside the subject of discovery. It is sufficient to say that, pending any application raising an objection to any portion of the adversary's case as set forth in his pleadings, no discovery of matters relating to the portion so covered would, as a rule, be enforced on the broad ground that the matters of fact to which it may relate are not about to be in question in the action, or that for the purpose of the preliminary issue (and especially in the case of a demurrer under the old practice) those facts may be assumed to be as alleged, and therefore no proof of them is needed; see Dan. Ch. Pr. 466, 529, 535, 536: Wigr. Pl. 97, 98; and Wigr. prop. ii., cited *ante*, p. 11.\*

But if no legal preliminary objection can be raised, and the stage of the action at which discovery is sought is proper, any objection must be founded upon the nature of the particular discovery sought. For, it being no longer possible to say either that it is not known what matters of fact will be in question, or that there is no matter of fact about to be in question in the action at all, it can only be urged that the particular discovery sought does not relate to the matters of fact which are about to be in question in the action, or is objectionable on other internal grounds. If the discovery required is relevant to the issues of fact about to be raised then, subject to established exceptions (see *post*, Bk. II.), it must be given. If the party does not choose to raise any objection which he might raise to the issue itself, he cannot raise such objection to giving the discovery relevant to the issue. The objection is to the issue being raised, and not to the discovery. If he intends to allow the issue to be raised,

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\* It may here be observed that under the old chancery practice a pure affirmative plea took away a plaintiff's right to all discovery on the technical ground that he was entitled to discovery only to support the matters stated in his bill, and these were admitted for the purpose of the plea. Under the present practice it is conceived (see *post*, pp. 35, 464, 500) that he has a right to discovery to disprove the plea.

the giving of the discovery follows as a matter of course : he cannot withhold from the adversary the means of proving his case upon that issue : see *Morgan v. Harris*, 2 B. C. C. p. 123 : *Dell v. Hale*, 2 Y. & C. C. C. p. 4 : *post*, p. 19 : and *Lyell v. Kennedy* (cited *post*, p. 392).

There is a class of actions which stand, to a certain extent, by themselves, namely, what are called fishing actions. Discovery is given in courts of equity to assist a plaintiff in proving a known case, and not to assist him in a mere roving speculation, the object of which is to see whether he can fish out a case : Wigr. Pl. 203 : *Gourley v. Plimsoll*, L. R., 8 C. P. p. 374 : Hare on Discov. p. 186 : and see *ante*, p. 13 : *post*, p. 37, citing Fry, L. J., in *Whyte v. Ahrens* : and *post*, pp. 98, 461, 511 : and see generally as to fishing actions for the recovery of land, *post*, Bk. II. Chap. III. Pt. 3.

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II. *As to what is relevant or material Discovery. (As to whether or to what extent a party's right to discovery is limited to that which is relevant to some matter in question between himself and the party from whom he seeks it, see post, Chap. III. Sect. II.)*

See *ante*, p. 12, as to referring the relevancy of discovery to the matters in question and not to the case of the party seeking discovery : and see *post*, p. 18.

The words "material, relevant, pertinent," are used indiscriminately. "Relevant" means "material" or "pertinent" (see as to a special use of the word "impertinence," *post*, p. 122) : see Hare, p. 188 : and *Allhusen v. Labouchere*, 3 Q. B. D. pp. 661, 665, 666 : *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 656 : and *Fisher v. Owen*, 8 Ch. D. p. 651 : where all these words are used without any distinctive meaning.

The plaintiff was entitled to discovery of matters charged in the bill, provided they were necessary to ascertain facts material to the merits of his case and to enable him to obtain

a decree: Redes. Pl. 306: *Finch v. Finch*, 2 Ves. p. 492: material to the relief prayed by the bill: Redes. Pl. 191; *Wood v. Hitchins*, 3 Beav. 504: if it could be supposed that the discovery might be directly or indirectly material to the plaintiff (in a bill of discovery) in support or defence of any action: Redes. Pl. 193. The discovery must be material to the proof of the plaintiff's (that is to say, the party seeking discovery whether plaintiff or defendant: see Wigr. Pl. 11, 186) case, and to the relief (if any) prayed by him: it was not sufficient that it was merely connected with the subject of the suit: Wigr. Pl. 224, 243. Nothing is irrelevant which may have an influence upon the suit attending to the nature of it: *St. John v. St. John*, 11 Ves. p. 539. . If the matter as to which discovery is sought may be directly or indirectly material for arriving at a decision, the defendant must give the discovery: *Bleckley v. Rymer*, 4 Dr. p. 252.

See further illustrations of relevancy or materiality in connection with interrogatories, *post*, p. 113: with the production of documents, *post*, p. 183: and see also the cases cited *post*, pp. 32—34.

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For two reasons the courts dealt with these questions of immateriality or irrelevancy, and so to some extent under the present practice, see *Lyell v. Kennedy* (cited *post*, p. 392), with great latitude. In the first place, there was the technical rule requiring a full answer: and in the second place, the plaintiff *ex necessitate rei* filed his interrogatories before the answer was put in, and before, therefore, it could be seen what the ultimate issues would be, or what the ultimate relief to which he might be entitled. At this early stage of the action it was impossible to say precisely what might or might not be material. The court could not go into the whole merits of the case for this purpose; and, therefore, unless the immateriality of the discovery was clear, or unless the discovery was open to some other objection, it would not interfere or relieve the defendant from his obligation to make a full answer: see *A. G. v. Richards*, 6 Beav. 449—451: *Reeces v. Baker*, 13 Beav. pp. 439—441: *Hoffmann v. Postil*,

L. R., 4 Ch. 679, 680: *Tipping v. Clarke*, 2 Ha. p. 390—391: *Carver v. Pinto Leite*, L. R., 7 Ch. p. 77: Hare, p. 196: *Bishop of London v. Fytche*, 1 B. C. C. 96: and see *post*, p. 111. Where the discovery was a matter of indifference to the party of whom it was sought, the court did not weigh in golden scales the question of materiality or immateriality: *Moore v. Craven*, L. R., 7 Ch. p. 96, n.: *Carver v. Pinto Leite*, *ibid.* p. 97: and see *post*, p. 31. If it might be useful in obtaining any relief which the plaintiff might obtain: see *Hambrook v. Smith*, 17 Sim. p. 214: if the matter be pertinent according to any decree that might be made within the scope of the bill it could not be held impertinent: *A. G. v. Foster*, 2 Ha. 89.: and see Ha. pp. 158, 161. As regards a bill of discovery the objection of immateriality was seldom raised, for the plaintiff had to pay the costs, and it was for him to judge of the materiality: see *Bishop of London v. Fytche*, cited *post*, p. 106.\*

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For the purpose of testing the materiality of the discovery to a particular issue (see *ante*, p. 12, as to referring the relevancy to the matters in question and not to the case of the party seeking discovery), it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought: see *Gresley v. Mousley*, 2 K. & J. p. 292: *Cannock v. Jauncey*, 1 Dr. p. 506: *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (discussed *post*, p. 183, and where the Court of Appeal reversed the decision of Pearson, J. who had refused to order the plaintiff to make a further affidavit of documents in respect of a document which was immaterial if his case were true, but material if the defendant's case were true): otherwise a party might shut out his opponent from discovery essential to support his case by simply denying that case: see *Stainton v. Chadwick*, 3 M. & G. p. 584: *Taylor v. Milner*, 11

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\* See as to the practice in respect of immateriality at common law, *post*, p. 111, in regard to interrogatories; *post*, p. 153, in regard to production of documents.

Ves. 42: *Mazarredo v. Maitland*, 3 Mad. p. 72: *Duncombe v. Davis*, 1 Ha. p. 189: *Cannock v. Jauncey*, 1 Dr. p. 506: *A.-G. v. Thompson*, 8 Ha. p. 114: Hare, p. 251: and *ante*, p. 16. A party cannot avoid the discovery by saying that the matter of which discovery is sought does not relate to the question, when the very question in the action is whether or not it does so relate. Nor will the court for the purpose of determining the relevancy of the discovery to a particular issue try that issue for the purpose of determining the relevancy of the discovery, for it is in order that that issue may be rightly determined that the discovery is required: see *Duncombe v. Davis*, 1 Ha. p. 189: *Gresley v. Mousley*, p. 292: and *Lyell v. Kennedy* (cited *post*, p. 392).

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Matter was material if it might affect the question of costs: see *Tipping v. Clarke*, 2 Ha. pp. 390—391: *Carver v. Pinto Leite*, L. R. 7 Ch. p. 98.

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The plaintiff in equity was entitled to discovery of matters necessary to substantiate the proceedings and make them regular and effectual in a court of equity: Redes. Pl. 307: *Finch v. Finch*, 2 Ves. pp. 492—493.

For instance, discovery of the existence whereabouts or interests of other persons, not parties, in order that they might be made parties: see *post*, p. 23, referring to Wigr. Pl. 298 and *A. G. v. Ellison: Finch v. Finch*, p. 493: *Hambrook v. Smith*, 17 Sim. pp. 214—216: *Dixon v. Fraser*, and other cases, *post*: the names of persons having possession of documents delivery or cancellation of which was sought by the decree: *Hambrook v. Smith*: Wigr. Pl. 295—298: and *post*, p. 182: of incumbrancers in actions for foreclosure sale or redemption: *Union Bank of London v. Manby*, 13 Ch. D. 239: *Anon. W. N. 76*, p. 23: *Rawlins v. Dalton*, 3 Y. & C. 447: of persons whom a lessee had caused to fell trees in order that the lessor might bring actions against them: *Standen v. Bullock*, Toth. 71: of the assignee of a lease:

*ibid* : Madd. Ch. Pr. 277 : of the name of the real defendant : *Sketchley v. Connolly*, *post*, p. 89.

In *Dixon v. Fraser*, L. R. 2 Eq. 497, an action for specific performance of a contract to sell a mill and machinery, the plaintiff, alleging that the property had been let and was deteriorating, was held entitled to have discovery of the names of the persons to whom it had been let and the terms for which it was let, for the plaintiff might wish to make them parties.

The demurrer of an executor on the ground that his co-executor was not a party was overruled, for the plaintiff had alleged in his bill that he knew not who was the other executor and prayed for discovery who he was and where he lived : *Bowyer v. Covert*, 1 Vern. 95 : and so in *Sherlock v. Disney*, 13 Ir. Eq. Rep. 233, where the plaintiff interrogated as to incumbrancers.

In a common law action, *Thol v. Leash*, 10 Exch. 704, a defendant was held bound to answer whether he acted in a certain transaction as agent or principal, and if as agent who was his principal.

In *Hancocks v. Lablache*, 3 C. P. D. 197, p. 202, an action against a married woman to which she successfully demurred on the ground that her husband was not joined as co-defendant, leave was given to amend and serve interrogatories on her, inquiring as to the name and address of her husband.

See *Bovill v. Cowan*, 15 W. R. 608, p. 609, where (in examination before an examiner) Lord Romilly held that when a number of persons unite for a common purpose of defence the plaintiff was entitled to know who they were. See also *Pepper v. Henzell* and other cases cited *post*, p. 46.

In an action in the Admiralty Court (for damages by collision) by ship-owners in personam against the defendant and others the owners of the ship M., the plaintiffs before petition filed were allowed to interrogate the only defendant who had appeared (as "improperly sued as one of the owners"), whether he was the owner, and in detail as to his connection with the ship, and who were the owners registered or beneficial, on an affidavit showing special circumstances : *The Murillo*, 28 L. T. 374.

See the cases *post*, pp. 32, 33, where discovery of this kind was withheld as being required only in the event of the plaintiff's success in the action.

The names of partners suing or being sued as a firm can be obtained under Ord. XVI. r. 14 : but an order under this rule not being an order for discovery, the provisions of Ord. XXXI. r. 21, as to attachments do not apply : *Pike v. Keane*, 24 W. R. 322.

A person could not be made a party merely for this purpose : discovery of this kind could only be had of a person properly made a party on other grounds : see *post*, p. 45 : and see *post*, Chap. III. s. 1, generally as to the inadmissibility of making a person a party solely for the purpose of discovery. But a bill of discovery may be brought against a person in order to discover the names of other persons for the purpose of bringing an action against them under some circumstances : see *post*, p. 40 n.

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The party seeking relief is entitled to discovery not only for the purpose of establishing his case at the hearing but



also for the purpose of obtaining a perfect decree: Wigr. Pl. 295, 298: for the subsequent purposes of the suit in case he should succeed: see *Carrer v. Pinto Leite*, L. R. 7 Ch. p. 97: and this whether as bearing on the extent or amount of his claim: see Wigr. Pl. 159: or even in some cases as being a part of the relief he prays, as for instance accounts: see *Elmer v. Creasy*, L. R. 9 Ch. p. 71, and *post*, pp. 25—34, 125: though discovery of this nature (termed consequential or subordinate or dependent discovery: see Wigr. Pl. 51—55) will sometimes be withheld until he has established his case: see *post*, Chap. II.: and see *post*, Book III. Chap. IV. as to discovery after decree.

Whatever the plaintiff is bound to prove at the hearing, he is at liberty to prove by the oath or admission of the defendant: *Tipping v. Clarke*, 2 Ha. p. 391: Wigr. Pl. 295: they are material facts proper to be stated in the statement of claim under Ord. XIX. r. 4: see *Millington v. Loring*, 6 Q. B. D. p. 194.

Where a plaintiff claims property he is entitled to discovery of what the property is which is sought to be recovered: *Greenwood v. Greenwood*, 6 W. R. 119 (production of documents for this purpose): (bills of discovery in aid of actions for trover were common: see *Macclesfield v. Davis*, 3 V. & B. 16): so lists of documents which the decree, if he gets one, will order to be delivered up to him or cancelled: *Hambrook v. Smith*, 17 Sim. pp. 213—216; Wigr. pl. 102, 295—298: *Tipping v. Clarke*, 2 Ha. p. 391: and see *post*, pp. 182, 183: or produced to him: see *post*, p. 22: but not to have them produced by way of discovery or to have discovery of their contents, unless their contents bear upon the matters in question: see *post*, p. 23.

Lists of securities held by prior incumbrancers must be given in favour of parties seeking to redeem: see Bk. II. Ch. IV. Sect. III.: or by creditors in favour of sureties: see *Bridgewater v. De Winton*, 9 Jur. N. S. 1290; 12 W. R. 40.

The amount of the plaintiff's demand is a point in the plaintiff's case upon which a decree may be made at the hearing: Wigr. pl. 159.

Documents relating to the amount of damages related to the action within the meaning of section 6 of the C. L. P. Act, 1851: *Pape v. Lister*, L. R. 6 Q. B. 242, cited *post*, p. 471: see *Elkin v. Clarke*, *post*, p. 34: and *Ladds v. Waltheu*, *post*, Bk. III. Ch. IV. Sect. I.

Any matters on which a jury would act in assessing damages may be stated in the statement of claim as being material facts within Ord. XIX. r. 4: see Brett, M. R. in *Millington v. Loring*, 6 Q. B. D. p. 196 (fact of seduction in an action for breach of promise of marriage): discovery of such matters is clearly material therefore.

Conversely a defendant is entitled to discovery for the purpose of reducing damages: *Pape v. Lister*: *Wilts, &c. Co. v. Swindon, &c. Co.* 20 W. R. 353.

So discovery may be had by a defendant for the purpose of paying the proper amount into court: see *post*, p. 468.

That the discovery sought was identical with that which the plaintiff would obtain in the event of his obtaining a decree at the hearing of the cause was not of itself an objection to the discovery if it was necessary for the purposes of the suit: *Chichester v. Donegal*, L. R. 4 Ch. 416, p. 419: and see *ante*, p. 21, and *post*, pp. 25—34, 125, as to cases where accounts are sought by way of relief, and also by way of discovery. But where the discovery is only necessary for consequential purposes, and the party's right to it in the shape of relief is denied, the court has of course under Ord. XXXI. r. 20 (discussed *post*, Chap. II.) an absolute discretion to withhold it until the party has established his right: see also *ante*, p. 12.

In *Chichester v. Donegal* the plaintiff claiming under a settlement filed a bill against the tenant for life for production of the settlement and other deeds, and that he might set forth a description of the settled property: the defendant was ordered in answer to interrogatories to set forth the contents of the settlement, the particulars of the estates comprised in it, and a list of documents in his possession. Here it is to be noticed that the defendant did not dispute the plaintiff's title under the settlement: (see further as to this case, *post*, p. 278).

See generally as to actions for discovery by way of relief distinguished from actions for discovery proper, *post*, p. 276.

In actions for delivery up of documents their production by way of discovery would be ordered where material for the actual determination of the question: *Beresford v. Driver*, 14 Beav. 387, action against an agent, where production of plans maps and other documents was ordered, for the plaintiff was entitled to see them in order to ascertain whether they were of such a character (see *post*, p. 208) as that he would be entitled to have them delivered up at the hearing: *Bishop of Winchester v. Bowker*, 29 Beav. 479, action against the steward of a manor, where on the same ground production of indexes and other documents was ordered: *Brougham v. Canvin*, 16 W. R. 688: W. N. 68, p. 112, action by Lord Brougham to recover documents entrusted to the defendant as materials for writing his life, where their production was ordered, the plaintiff offering to pay a reasonable sum for any work that the defendant had done in relation thereto, on the ground that without seeing them he could not estimate the value of the work done: and the defendant did not lose his lien by inspection (see as to lien, *post*, p. 205). But where the object of the suit was a declaration of the plaintiff's right to a copy of a certain book which had nothing to do with the suit antecedently to the hearing, as a matter of discretion (its disclosure would have enabled the plaintiff to get a great portion of the defendant's custom) properly exercised a motion for its production was refused: *Lingen v. Simpson*, 6 Madd. 290, explained in *Chichester v. Donegal*, p. 420. In *Republic of Costa Rica v. Strousberg*, 11 Ch. D. 323, the Court of Appeal refused to affirm a portion of an interlocutory injunction ordering delivery up of the documents the delivery up of which was the object of the suit, but without prejudice to any application to their production by way of discovery.

Generally wherever the production delivery up or cancellation of certain documents will be part of the relief to which

a party will be entitled if he succeeds in the action, he is not entitled to a discovery of their contents or to their production unless their contents have any bearing on any of the matters in question; but he may be entitled to have a list of them, the names of the parties thereto, a denial or admission of the adversary's possession of them, and the names of any other persons having any possession of them on the grounds now being considered (and also in order that these other parties or persons may if necessary be made parties, see *ante*, p. 19): see Wigr. Pl. 102 and 295—298, criticising *A. G. v. Ellison*, 4 Sim. 228 (where production was ordered of certain derivative leases, the suit being to set aside the principal lease, and the derivative leases not bearing on the question): and see *Kettlewell v. Barstow*: and *Wright v. Vernon*, cited *post*, p. 190: and *post*, p. 182.

## CHAPTER II.

## CONSEQUENTIAL DISCOVERY.

It has already been seen, *ante*, p. 21, that consequential (or subordinate or dependent) discovery is material or relevant discovery. It is proposed in this chapter to discuss the manner in which the court deals with it.

I. *The Present Practice.*

The present practice is regulated by Ord. XXXI. r. 20.\*  
 “If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question (including mixed questions of law and fact: Lindley, L. J. in *Tasmanian, &c. Co. v. Clark*, 27 W. R. p. 678) in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve† the ques-

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\* By Ord. XXXVI. r. 6, power is also given to the courts to order the trial of preliminary issues. Its object is not specially declared to be to protect a party from giving discovery; but in two cases of *Emma Silver Mining Co. v. Grant*, 11 Ch. D. pp. 926—927, and *Piercey v. Young*, 15 Ch. D. p. 479, Jessel, M. R. refers to instances in which he had granted separate trials of the issues apparently under this rule, and upon considerations which might be valid under rule 20. One instance was that of a lady who based her claim for an intricate and expensive account upon the allegation that she was the legitimate child of a particular person: and the other that of a pauper with a very fishing case who asked among other things for a great deal of discovery as being the heir-at-law. In each case a preliminary issue was directed as to legitimacy and heirship respectively. Under Ord. XVII. r. 1 the court has also power to separate trials of the issues: see *Bagot v. Easton*, 7 Ch. D. 1.

† Under the old chancery practice where a plea had been found false the court would enforce any discovery which had been covered by the plea when the plaintiff could not obtain complete relief without further evidence: see Wigr. Pl. 98: Redes. Pl. 302: *Wood v. Strickland*, 2 V. & B. p. 158: *Thring v. Edgar*, 2 S. & S. p. 278.

tion as to the discovery or inspection." By rule 6 (see *post*, p. 108) a party may object to answer an interrogatory on the ground that it is not sufficiently material at that stage. And by rule 12 (see *post*, p. 155) the application for an affidavit of documents may be adjourned, or the affidavit limited to particular classes of documents, on grounds of the same kind.

It is obvious that in some cases it might be extremely prejudicial to a defendant if he were compelled to give discovery of this nature before the determination of the preliminary issue or matter in question. If a denial of the party's interest by his opponent were not effectual to stay the necessity of giving consequential discovery, the party might get discovery of all the particulars of any transaction however secret and important with which he had no manner of concern merely by introducing into his pleadings the false allegation that he had an interest therein: *Mendizabel v. Machado*, 1 Sim. p. 78: and see *Smith v. Beaufort*, 1 Ha. p. 523: and *ante*, p. 14, and *post*, pp. 256—257. It would be a monstrous thing that a man by merely alleging that he had a share in the concern, which allegation has been denied and has not been established, and whilst it was doubtful whether it could be established, could get the accounts of a defendant's private business and of his dealings with other people: James, L. J. in *G. W. C. Co. v. Tucker*, L. R. 9 Ch. p. 378.

Under the old chancery practice the court was much embarrassed in these cases of consequential discovery by the technical rule (see *ante*, p. 14) which required a party submitting to answer, though he altogether denied the plaintiff's title, to answer fully, even as to consequential matters, as of account: see Lord Selborne in *Elmer v. Creasy*, L. R. 9 Ch. pp. 71—72: and, according to some judges, though not others, to produce all relevant documents as a part of such full answer: see *post*, sect. 2, as to the old chancery practice.

Under the provisions of the above rules no technicalities of this kind compel the court to order discovery which is not required for the determination of the immediate issue before the court. In *Parker v. Wells* (cited *post*, p. 27), where

accounts were required in answer to interrogatories, Brett, L. J. pp. 485—486, considered that rule 19 (now rule 20) of Ord. XXXI. now governed cases of this kind, that the old chancery practice in this respect was no longer binding, and that the answers to the interrogatories in question could not determine any issue in the action, and, if they had to be given at all, ought not to be required to be given until after the issues had been decided. So Jessel, M. R. in the same case, p. 483, said, “Now in deciding whether discovery ought to be given we must first consider whether it will help the plaintiff at the trial. If it will not, but will only be of use if the plaintiff obtains a decree, then, having regard to the discretion given to the court by Ord. XXXI. r. 19, we must consider whether it is fair that the defendant should be obliged to give it at this stage of the proceedings, or whether to compel him to give it would be oppressive.” In *Rowcliffe v. Leigh* (cited *post*, p. 27), James, L. J. at p. 263, said, “I think the 19th rule of Ord. XXXI. is one of the most wholesome rules introduced by the Jud. Acts into practice, namely, that no discovery is to be taken from a defendant unless it is really relevant to the issue first to be tried.” See also the judgments in *Whyte v. Ahrens*, cited *post*, p. 36.

This rule (20) has been applied to discovery by way of answers to interrogatories: see *Parker v. Wells*, cited *post* and *ante*: *Wood v. Anglo-Italian Bank*, 34 L. T. 255: and also to discovery by way of production of documents: see *Verminck v. Edwards*, cited *post*: *Rowcliffe v. Leigh*, cited *post*: and there is no doubt that it may also be applied to prevent an affidavit of documents being made which would be useless: see *Dickson v. Harrison*, 47 L. J. Ch. p. 688; or for the purpose of limiting it to documents required for the determination of the immediate issue, and see now rule 12, referred to *ante*: and see also *Whyte v. Ahrens*, *post*, p. 37.

But where two alternative issues would in the usual course come on to be tried together, no order for the preliminary trial of one of them (an issue of law, the construction of a lease) having been obtained, the Court of Appeal refused to

postpone leave for the plaintiff to interrogate until this issue should be decided: *Hounston v. Sligo*, W. N. 84, p. 51, reversing Pearson, J. on another ground, p. 29.

In *Parker v. Wells*, 18 Ch. D. 477 (and see *ante*), the plaintiff alleged that a sum of money had been deposited with the defendant upon trust to pay the interest to certain persons for their lives and then upon trust for the plaintiff, and that interest had been paid to the tenants for life in pursuance of such trust. The defendant denied the trust but admitted the deposit. It was held that the defendant must if the interrogatory had not been too wide have answered whether any and what payments had been made in respect of interest, as the answer might help the plaintiff: pp. 485, 487: but that he need not give accounts of profits alleged to have been made by employment of the trust fund in business, for that an account of profits would not help the plaintiff to get a decree, and that such admissions as he might make would not be such as the plaintiff could use for the purpose of getting an immediate order for payment: p. 484—485 (see as to this, *post*, p. 29): that it would require an elaborate examination of his books and much time and trouble, and that it would be oppressive to order it while the plaintiff's title was in dispute: pp. 484, 486: and so per Jessel, M. R. in *Hemery v. Worsman*, *post*.

In *Hemery v. Worsman*, 26 S. J. 296, an action to set aside the sale of a business, the defendant was protected from answering interrogatories requiring him to set out the profits of the business since the sale, for they would not help the plaintiff in obtaining a decree.

In *Rowcliffe v. Leigh*, 6 Ch. D. 256 (see also *Leigh v. Brooks*, *post*, p. 37), an administration action, a claim was brought in by S. a horsedealer for the balance due to him in respect of the account of the testator with himself for charges in connection with the purchase and sale of horses for the testator. S. in his affidavit of documents scheduled a great number of documents but claimed to seal up certain parts of some of the books and in particular of certain "horse books" as not material to his claim. The executrix took out a summons to consider the sufficiency of the affidavit, and calling upon him to make a further affidavit stating what portion of the sealed-up parts contained entries relating to horses sold to or bought from the testator or to the prices at which and persons to whom S. had sold horses mentioned in his accounts, and that he might be ordered to unseal and produce such entries. The executrix contended that S. had sold and bought the horses for the testator on commission as his agent; and therefore claimed to see the prices; S. denied the alleged agency and arrangement. The Court of Appeal, reversing Hall, V.-C. refused the required discovery (except as to the dates of the sales) on the ground that the prices actually given had no bearing on the issue, and that the probability of S.'s success was so great that in the exercise of their discretion they should not compel him to disclose what would then be his own private affairs until after the issue should be decided against him.

In *Verminck v. Edwards*, 29 W. R. 189, where the issue was whether the defendant acted as agent for the plaintiff in certain transactions, the Court of Appeal refused the plaintiff leave to inspect books which the defendants swore to contain only invoices of the sellers of the goods in question to themselves and had nothing to do with the point at issue, and an inspection of which might be injurious to the defendant: this was under Ord. XXXI. r. 19 (now 20).

See also *Wood v. Anglo-Italian Bank*, 34 L. T. 255, where this rule was applied.

See on the other hand *Dickson v. Harrison*, cited *post*, p. 36: and *Whyte v. Ahrens*, cited *post*, p. 36, as to discovery of documents where a plea of settled accounts is set up.



Although under the present procedure the rule of a full answer which obtained in chancery has no place it is important to note that this rule was not founded solely on technicalities of practice.

There were three reasons of substance why a full discovery should be given at once: (1) that if it were postponed until a later stage the plaintiff might run the risk of losing it altogether by the defendant's death: *Elmer v. Creasy*, L. R. 9 Ch. p. 72: Wigr. pl. 163: *Baker v. Mellish*, 11 Ves. p. 76: *Shaw v Ching*, *ibid.* 306: *Chadwick v. Chadwick*, 22 L. J. Ch. p. 330: or other intervening accidents: *Elmer v. Creasy*: for instance documents might be lost suppressed altered or destroyed: Wigr. Pl. 163: (2) that (and this was especially the case where accounts were required) the plaintiff might be able to take an immediate and final decree for what on the defendant's statement might appear to be due from him and so avoid the expense of an account in chambers: see *Elmer v. Creasy*, L. R. 9 Ch. p. 72 (discovery of the details of an account but not necessarily with the same fullness as after decree so as to be oppressive, see *post*, p. 125): *Great Luxembourg Railway Co. v. Magnay*, 23 Beav. p. 652: *Clegg v. Edmondson*, 22 Beav. p. 141: *Dixon v. Fraser*, L. R. 2 Eq. 497 (suit for specific performance against a vendor—account of rents and profits as being a small matter and not involving time or trouble): *Roué v. Teed*, 15 Ves. p. 378: *Robson v. Flight*, 33 Beav. 268 (suit to set aside lease against the assignee—account of rents and profits): Wigr. Pl. 155, 159: (3) that the plaintiff might see at once whether it was worth his while to go on with the action: Wigr. Pl. 163: *Robson v. Flight*: *Clegg v. Edmondson*: as for instance where a claim was made against the estate of a deceased person in which case the executor (see further, *post*, p. 29, as to the executor) would be ordered to give abridged accounts—some sort of balance sheet: *Brooks v. Boucher*, 31 L. J. Ch. 821: or a general account of his receipts and payments: *Cull v. Inglis*, 16 W. R. 471 (suits to make estates of deceased trustees liable for alleged breaches of trust).

Grounds (2) and (3) are to some extent valid under the

present practice. As to (2) : there are cases in which the account would be complicated and in which the plaintiff's title is denied in which it would be refused : there are cases in which the plaintiff's title to it may be denied as a title which is fairly open to trial and which has to be affirmed at the trial and where the giving of the accounts would occasion little trouble to the defendant and would be of immense advantage to the plaintiff by enabling him to get an immediate decree or order at the trial and where the judge in the exercise of his discretion may allow it : Jessel, M. R. in *Benbow v. Lou*, 16 Ch. D. p. 98 (and *Hemery v. Worsman*, 26 S. J. p. 296), referring to *Saunders v. Jones*, 7 Ch. D. 435, as an instance in which it was allowed : and see *ibid.* pp. 449, 453, where the aggregate amount of certain monies on which a commission was claimed (see this case further cited, *post*, p. 452) was ordered to be given on this ground so as to save the necessity of an expensive account in chambers : see on the other hand *Parker v. Wells*, *ante*, p. 27, where no admissions that the defendant would be likely to make would be of any use for this purpose : and *Lockett v. Lockett*, L. R. 4 Ch. p. 340, where an account under the decree could not have been avoided : and where therefore this ground failed.

As to (3) : in a suit for redemption against prior incumbrancers the plaintiff was held entitled to discovery of securities held by them in order that he might know whether it was worth his while to redeem them : *West of England Bank v. Nicholls*, 6 Ch. D. p. 615.

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An executor was and still is under a special obligation to set out the accounts of the testator's estate.

Unless he admitted assets (see *post*) he must have set forth the accounts though he denied the debt or other claim or title of the plaintiff : Redes. Pl. 311 : *Shaw v. Ching*, 11 Ves. p. 304 : *Gethin v. Gale*, Ambler, 354 : *Freeman v. Fairlie*, 3 Mer. 24 : and see *Brooks v. Boucher* and *Cull v. Inglis*, cited *ante*.

In *Thompson v. Dunn*, L. R. 5 Ch. p. 576, Lord Hatherley (and see the same judge to a similar effect in *De la Rue v. Dickinson*, 3 K. & J. p. 391) observed, " There is no case in which the court has ever applied the doctrine of *Adams v. Fisher* (see as to this *post*, p. 31) so as to allow an executor by

answer to refuse to set out an account of his receipts and payments. I do not mean to say that there might not be a case where the court would allow him to do so if the asking for the account was vexatious: but looking at the position of an executor the court has always thought it desirable that he should by his answer make a full discovery of the assets so that the plaintiff may be in a position to move to have the balance brought into court. The case of a partnership stands on a different footing: for there no use can be made of an account before the hearing. So in the case of a patentee's suit where the defendant denies infringement an account of profits is of no use before the hearing . . . . The court has often compelled executors to answer even where the discovery sought was vexatiously minute . . . . "but still the court does not sanction an executor's setting out a list of assets with the minuteness of an auctioneer's catalogue;" and accordingly in this case (the plaintiff claiming a lien on the testator's estate employed in a trade to which he had supplied goods) Lord Hatherley ordered an account, not being able to say that the plaintiff had no chance of obtaining a decree.

Nor has the Jud. Act affected this obligation of the executor: *Re Sutcliffe, Alison v. Alison*, 44 L. T. 547, where a further reason was suggested namely that the beneficiaries might have the executor's oath as to the true state of the accounts and so discontinue the action if they wished it: in this case the executor had delivered accounts which the plaintiffs alleged to be incorrect: the executor admitting their incorrectness, but, alleging that he had since corrected them, was allowed to answer by verifying these corrected accounts.

An executor admitting assets to satisfy a plaintiff's claim need not have set out an account of the estate: *Agar v. Regent's Canal Co.* Cooper, p. 215: *Pullen v. Smith*, 5 Ves. 20: nor a schedule of documents relating to real estate on which the legacies in question were charged: *Forbes v. Tanner*, 9 Jur. N. S. 455.

On the same principle directors of an insurance company admitting assets for payment of policies were protected from discovery: *Pritchard v. Murray*, 12 Jur. 616.

Trustees and executors must give their cestui que trusts full information as to the testator's property: *Mayor v. Arnott*, 2 Jur. N. S. 387, where it was held insufficient in answer to a bill for administration to say that the testator had by a deed of a certain date conveyed part of his property without saying to whom or on what trusts.

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## II. *As to the Old Practice in Chancery.*

The subject of consequential discovery in connection with the rule of a full answer was discussed in the Court of Appeal in Chancery in the following cases: *Lockett v. Lockett*, L. R. 4 Ch. 336: *Moore v. Craren*, L. R. 7 Ch. 94 n.: *Carver v.*

*Pinto Leite, ibid.* : *Elmer v. Creasy*, L. R. 9 Ch. 69 : *Saull v. Broune, ibid.* 364 ; *Great Western, &c. Co. v. Tucker, ibid.* 376 : *Heugh v. Garrett*, 44 L. J. Ch. 305.

In *Elmer v. Creasy*, Lord Selborne laid down the obligation to make a full answer, even where the discovery sought was consequential only, as absolute, the only exception being where the discovery was sought vexatiously or oppressively.

In others of those cases, it was laid down that the rule of a full answer would be departed from where the discovery was not material for the purpose of enabling the plaintiff to establish his case at the hearing but only material for the subsequent purposes of the suit in case the plaintiff should succeed, and might be used prejudicially to the defendant if the plaintiff failed : James, L. J. *Carver v. Pinto Leite*, p. 97 : and see the same judge in *Heugh v. Garrett*, p. 307 : where the discovery would be burdensome or injurious to the defendant to give and probably might never be used at all : James, L. J. in *Saull v. Broune*, p. 367 : and see *Lockett v. Lockett*, pp. 341—342, where detailed and oppressive accounts were asked for which could be obtained by inspection (as to which see *post*, p. 126).

Although (as seen *ante*, p. 18) the court did not when discovery was a matter of indifference to the defendant weigh in golden scales the question of materiality or immateriality, yet where the discovery might be used prejudicially to the defendant the court would consider whether it was material for the purpose of enabling the plaintiff to establish his case at the hearing or material only for the subsequent purposes of the suit in case the plaintiff should succeed : see James, L. J. *Carver v. Pinto Leite*, p. 97 : Lord Hatherley in *Moore v. Craven, ibid.*

Although theoretically the right to production rested on the same footing as the right to a full answer : see Wigr. Pl. 285, and *post*, p. 151 : in practice the courts exercised a wider discretion (but see Romilly, M. R. in *Swinborne v. Nelson*, 16 Beav. pp. 425—426) in withholding an order for production of documents which were only consequentially relevant, than in the case of answers to interrogatories : see Wickens, V. C., in *Carver v. Pinto Leite*, L. R. 7 Ch. p. 92 : Lord Hatherley, in *Mansell v. Feeney*, 2 J. & H. p. 323 : *Lancaster v. Evors*, 1 Ph. pp. 353—354.

Where the plaintiff's interest and title were denied not all the documents but only those necessary or material to the question to be decided at the hearing ought to be produced : *Turney v. Bayley*, 12 W. R. 633 : 10 L. T. 115 : 33 L. J. Ch. 499, cited *post*, p. 189 : and see Lord Hatherley in *Mansell v. Feeney*, 2 J. & H. pp. 316—317, 323, cited *post*, p. 188 : and generally *post*, Chap. V. Section 8 (c). (p. 186).

The principal case was *Adams v. Fisher*, 3 M. & C. 526, where, the defendant denying his employment by and liability to account to the plaintiff, Lord Cottenham refused to order the production of various scheduled documents exclusively relating to the matters in respect of which an account was claimed on the ground that their production could not possibly aid the assertion of the plaintiff's equity (p. 546), and that it was only documents necessary to make out his equity that he was entitled to see. This decision was however regarded with considerable mistrust in many subsequent cases as

being a departure from the strict rule of a full answer: see *Swinborne v. Nelson*, 16 Beav. pp. 424—430: *Lancaster v. Evors*, 1 Ph. 349: Wigr. Pl. 153—184: but its authority was admitted: see for instance *A. G. v. Thompson*, 8 Ha. pp. 112—115: *Harris v. Harris*, 4 Ha. p. 184: *Bute v. Glamorganshire Canal Co.*, 1 Ph. p. 685.

Where the plaintiff's title or case was not clearly and positively denied: *Harris v. Harris*, 4 Ha. p. 184, cited *post*, p. 507: *Edwards v. Jones*, cited *post*, p. 189: *Sicabey v. Sutton*, cited *post*, p. 33: and see *post*, p. 501: or where it did not clearly appear that the discovery (and particularly where production of documents was sought) was clearly immaterial to the question to be decided at the hearing: *Harris v. Harris*, p. 184: *A. G. v. Thompson*, 8 Ha. pp. 112—115, cited *post*, p. 509: *Bute v. Glamorganshire Canal Co.* 1 Ph. pp. 685—686, cited *post*, p. 508: *Ferrier v. Atwood*, cited *post*, p. 507: *Mansell v. Feeney*, cited *post*, p. 188: *Bannatyne v. Leader*, cited *post*, p. 189: and see *post*, pp. 187—189: production would be ordered.

The following are the principal cases on consequential discovery in equity. In all the cases cited, *post*, where discovery of accounts of or production of books of a business was ordered it may be noted that the plaintiff was not an entire stranger alleging a partnership denied by the defendant, but a person who had at one time an interest in the business, the question being whether that interest had terminated or still existed: see for instance *Clegg v. Edmondson*, 22 Beav. p. 138.

*Jacobs v. Goodman*, 2 Cox, 282—accounts of business refused—partnership denied: *Donegal v. Stewart*, 3 Ves. 446 (compare *Rowcliffe v. Leigh*, *ante*, p. 27)—plaintiff alleging that defendant bought pictures for him on commission—defendant denying it and alleging that he sold them to plaintiff—discovery of sums given by defendant for the pictures refused: both these cases regarded by Lord Selborne in *Elmer v. Creasy*, p. 71, as infringing on the rule of a full answer: *Adams v. Fisher*, cited *ante*, p. 31: *Hus v. Richards*, 2 Beav. 305—suit by widow of partner to set aside an arrangement respecting the business after his death and for an account—production ordered of the books of account of the business since the arrangement, for she might be entitled to an account: *Swinborne v. Nelson*, 16 Beav. 416—suit for alleged infringement of patent and account—defendant denying the infringement was held bound to discover the names and addresses of his customers, the articles manufactured by him, the prices, profits, &c.—rule of full answer—see other cases of infringement of patent, *post*, Book III. Chap. I., and *De la Rue v. Dickinson*, there cited; *Clegg v. Edmondson*, 22 Beav. 125\*—suit for accounts of profits of a colliery (of which

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\* In this case the defendant alleged that the documents would not assist the plaintiff as they related exclusively to business done since the date when he (the defendant) asserted that the partnership terminated and in which business the plaintiff had no interest; the allegation therefore was that they were irrelevant to the issue of partnership or no partnership. On p. 139 Lord Romilly suggests as a possible ground for protection, that they constituted exclusively the defendant's own evidence: but this ground involves totally different considerations: see *post*, p. 187.

the lease was renewed) subsequent to a particular date—defendant alleging that the partnership with the plaintiff had terminated on that date and that he had no interest in the business after that date was held bound to give accounts and produce documents—rule of full answer—(on app. 3 Jur. N. S. 299, when an arrangement was come to, see *Elmer v. Creasy*, L. R. 9 Ch. p. 73): see a similar case *Ferrier v. Atwood*, cited *post*, p. 189: and *Hall v. Hargreaves*, *post*: *De la Rue v. Dickinson*, 3 K. & J. 388—similar suit to *Swinborne v. Nelson*, *ante*—exceptions ordered to stand over till the hearing, see *Elmer v. Creasy*, p. 73, so far as they related to matters not bearing on the question of infringement: *Swabey v. Sutton*, 1 H. & M. 514—suit by cestui que trust against trustees of a settlement for account of moneys received by them—the defendants not clearly denying the plaintiff's claim ordered to set forth the account: *Letts v. Parry*, *ibid.* 517—suit by London solicitor against a country solicitor for accounts of agency business transacted by other persons in breach of agreement—defendant denying the claim not compelled to give accounts: *Reade v. Woodroffe*, 24 Beav. 421—plaintiffs charging that defendants carried on a solicitor's business in London as their agents and seeking an account—discovery of accounts—names of clients &c. on the principle of a full answer and also as being material to prove the agency: *Hall v. Hargreaves*, W. N. 69, p. 69—similar to *Clegg v. Edmondson*, *ante*—production of books of account ordered as being a discovery of profits made by use of plaintiff's capital: *Great Luxembourg R. Co. v. Magnay*, 23 Beav. 646—suit to have it declared that defendant was trustee for the company of certain shares—defendant held bound to set out his dealings with the shares—full answer: *Elmer v. Creasy*, L. R. 9 Ch. 69—suit for redemption and account with rests against mortgagee in possession admitting himself to be redeemable—defendant ordered to give accounts not only on the ground of his obligation to give a full answer even in respect of consequential accounts, but also on the ground that they might assist the plaintiff in proving his title to take the account with rests—not necessarily such a minute account as might have to be given after decree: *Moore v. Craven*, L. R. 7 Ch. 94, n.—suit for account of profits in respect of goods alleged to have been sold by defendant as agent for plaintiff—defendant denying the agency protected from discovering the names and addresses of the purchasers from him, for they would not in any manner tend to prove agency: *Carver v. Pinto Leite*, cited *post*, p. 553, under actions for infringement of patent or trade-marks: *Dos Santos v. Frietas*, cited Wigr. pl. 239—suit by creditor against executor charging that he had mixed the testator's money with his own and interrogating as to his balance at his bank—refused as being an inquisition into his private affairs: *G. W. C. Co. v. Tucker*, L. R. 9 Ch. 376—suit for account; plaintiffs alleging defendant was liable as their agent, defendant denying the agency—interrogatories as to cheques and profits—held that they need not be answered it being a case in which the court would not compel a defendant to give discovery of his own private means and transactions on the speculation that the plaintiff might afterwards want it if at the hearing he succeeded in the preliminary proposition that the defendant is or was an agent—vexatious and oppressive within the exception: *Heugh v. Garrett*, 44 L. J. Ch. 305—suit for account by plaintiff against defendant employed by him to sell goods on commission alleging that defendant had supplied goods to persons not in a certain list and praying that he should not be allowed to charge the plaintiff therewith—defendant alleged that he had authority to supply goods to such persons—held that it was material for the plaintiff to know the quantities and prices of the goods so supplied, but a discovery of the names and addresses of those persons was not required for determining the question between them and it might be injurious to the defendant if the plaintiff failed—liberty to seal up entries in ledgers journals &c. of the names and addresses but not of the quantities and prices: *Ord v. Fawcett*, 19 L. J. Ch. 487—inspection of entries in business books to show infringement of an alleged custom to grind corn: *Saull v. Browne*, L. R. 9 Ch. 364—suit by widow to establish that a business carried on by the defendants



belonged to her husband's estate as having been carried on with the assets of a business which two of the defendants had formerly carried on with her husband and subsequently with herself—interrogatories to discover what sums the defendants had drawn out of the new business—held that they must be answered for they were not vexatious or oppressive and might be material to make out the plaintiff's case: *Lockett v. Lockett*, L. R. 4 Ch. 336—suit to set aside agreement for dissolution of partnership—detailed accounts of partnership and of other monies refused as being immaterial for the purpose of the suit up to and including the decree, as involving expense and trouble, and the documents containing the partnership accounts being open to the plaintiff's inspection (as to this see *post*, p. 126): *Elkin v. Clarke*, 21 W. R. 447 (common law action)—inspection of documents relevant only to the amount of damages refused until the question of liability was decided: *Shallcross v. Weaver*, 2 H. & T. 231: inspection of title deeds ordered, the question being whether the title shown by them was a good or bad title.

Other cases are *Edwards v. Jones*, cited *post*, p. 189: *Mansell v. Feeney*, cited *post*, p. 188: *Harris v. Harris*, cited *post*, p. 189: and see the cases cited *ante*, pp. 28, 29: and the cases cited in Book III. Ch. I. on patent actions.

### III. *As to distinguishing between Discovery relevant to the Determination of the Issue, and Consequential Discovery.*

See as to distinguishing documents for this purpose, *post*, p. 186.

Under the old chancery practice where the defendant put in a plea he was protected from giving all discovery which was not relevant to the issue raised by the plea: Wigr. pl. 51: Redes. Pl. 231: *Jones v. Davis*, 16 Ves. 262. On the other hand the plaintiff was entitled to discovery (as well by way of answers to interrogatories as by way of production of documents) of all matters inconsistent with or which if true would disprove the plea (and in the case of a negative plea actually charged in the bill as evidence of the plaintiff's case in opposition to the plea: *Sanders v. King*: *Thring v. Edgar*: *Pennington v. Beechey*: Dan. Ch. Pr. 533: see Wigr. pl. 212—216, disapproving the doctrine laid down by these cases): *Sanders v. King*, 6 Madd. 61: 2 S. & S. 277: *Thring v. Edgar*, *ibid.* 274: *Pennington v. Beechey*, *ibid.* 282: *Foley v. Hill*, 3 M. & C. 475: *Harland v. Emerson*, 8 Bligh, N. S. 62: *Hardman v. Ellames*, 5 Sim. 640: (on app.) 2 M. & K. 732: *Chadwick v. Broadwood*, 3 Beav. p. 540: *Crow v. Tyrrell*, 2 Mad. 397: *Hunt v. Penrice*, 17 Beav. p. 531: *Young v. White*, *ibid.* 532: *Webster v. Do.* 1 Sm. & G.



p. 493 : *Jones v. Davis*, 16 Ves. 262 : *Evans v. Harris*, 2 V. & B. 361 : of all such material facts as upon the argument or hearing of the plea would be material for the purpose of such argument or hearing : Wigr. pl. 216. It was evidence which he was entitled to require in order to invalidate the defence made by the plea : Redes. Pl. 244, 245, n. : to try its truth and validity : Wigr. pl. 17, 48—52, 59, 90, 99, 109 ; to negative the negative plea : *Hardman v. Ellames*, 2 M. & K. p. 744.

Inasmuch however as under the chancery practice the interrogatories must have been founded upon allegations in the bill (see *post*, p. 111), and were in fact filed before the plea was put in, and, until the practice of ordering an affidavit of documents was introduced by the Chancery Procedure Act, see *post*, p. 155, the interrogatory as to documents required the defendant to set forth the documents in his possession relating to the matters stated in the bill and whereby their truth would appear, it is obvious that where a pure affirmative plea was put in, that is of something not anticipated by the bill, the plaintiff could get no discovery at all : in fact his case as stated in the bill was admitted for the purpose of the plea : see Wigr. pl. 58, 98 : Hare, p. 30 : Dan. Ch. Pr. 529, 535—536 : *Clayton v. Winchelsea*, 3 Y. & C. pp. 688—689. Under the present procedure this is not so. If to such a defence the plaintiff replies or even joins issue it is clear that he is entitled to discovery to a greater or less extent (the measure of the discovery being regulated according to the manner in which the plaintiff replies, that is to say whether by a general joinder of issue or by particular counter allegations, see as to interrogatories, *post*, p. 464 : as to production of documents, *post*, p. 500) in order to disprove it : it is a matter in question just as much as if it had been raised by the statement of claim. His reply is part of his case, and he has a right to discovery relating to that case : see *ante*, p. 12.

The following notes as to the old pleas may be useful. See also *post*, pp. 36, 37, the cases since the Jud. Act : *Whyte v. Ahrens* : *Dickson v. Harrison* : *Leigh v. Brooks*.

In a bill brought to impeach a decree on the ground of fraud used in obtaining it the plea must have contained averments negating the charges of fraud supported by an answer fully denying them: *Redes*. Pl. 239—245, 256—257.

A plea of stated account was a good bar to a bill for an account: it must show that the account was in writing or at least set forth the balance: charges of fraud or error must have been denied by averments in the plea as well as by answer: *Redes*. Pl. 259: *Dan. Ch. Pr.* 575—576: *Phelps v. Sproule*, 1 M. & K. 231.

Where the plaintiff impeached the account and charged that he had no counterpart and required the defendant to set it forth a copy of the account must have been annexed by way of schedule to the answer, so that if there were any errors on the face of it the plaintiff might have an opportunity of pointing them out: *Hankey v. Simpson*, 3 Atk. 303: *Redes*. Pl. 159.

A plea of a settled account and release to a bill by a cestui que trust against a trustee would not protect the trustee from a discovery (inspection) of vouchers: *Clarke v. Ormond*, Jac. p. 126: *Redes*. Pl. 260.

Where one partner instituted a suit against the other for dissolution and accounts the defendant was held not bound to set out the items of a particular sum mentioned in the partnership deed and stated by him to have been treated as a settled account, for the plaintiff did not seek that it should be opened or the deed set aside: *Wier v. Tucker*, L. R. 14 Eq. 25.

A plea of a release did not extend to discovery of the consideration on which it was made: if that (or the release, *Brooks v. Sutton*, *post*) was impeached the plea must be assisted by averments covering the grounds on which it was impeached: *Redes*. Pl. 261—3: *Dan. Ch. Pr.* 578: and see *Salkield v. Science*, 2 Ves. 107: *Roche v. Morgell*, 2 Sch. & Lef. 727: *Parker v. Alcock*, 1 Y. & J. 432, where the accounts and dealings on which the release was founded were impeached, and a plea extending to a discovery of such accounts and dealings was held bad, and directed to stand for an answer with liberty to except.

In every case the person who contests the release is entitled to have the discovery of the accounts on which the release is based: Romilly, M.R. in *Brooks v. Sutton*, L. R. 5 Eq. p. 364, a bill by cestui que trust against trustees of testator's estate to set aside a release improperly obtained and of which the recitals were untrue and for administration. Qu. whether production of the accounts cannot now be obtained: see *ibid.* p. 363.

In *Dickson v. Harrison*, 47 L. J. Ch. 686, Hall, V.-C. held that where the defendants set up settled accounts as a defence on trying the issue of settled accounts the plaintiffs who were alleged to be parties to them and who had impeached them had a right to see what they were, and therefore to have them scheduled in the affidavit.

In order to open a settled account, there must be in the bill a distinct statement of specific errors in the account: *Parkinson v. Hanbury*, L. R. 2 H. L. 1. But qu. under the present practice: see *Whyte v. Ahrens*, *post*.

*Whyte v. Ahrens*, 26 Ch. D. 717, is the latest case on the subject. The action was one for account against the defendants in respect of goods purchased by the latter on the plaintiffs' account, and charging in general terms that they had received commissions and failed to account for them: the defendants pleaded a settled account and traversed the allegations of fraud: Bacon, V. C. made the common order on the defendants for an affidavit of documents: the C. A. affirmed it, Fry, L. J. diss. The judgments of Cotton and Fry, LL.J. were so far as material as follows. Cotton, L. J.: "The defendants say that before the production of all their books is made, it ought to be decided whether or no there is a settled account between the parties. It was conceded that according to the old practice in chancery upon this claim, which does not contain such specific charges of fraud as would enable

the defendants to be ready at the hearing to meet them, production would have been ordered of the books material to the question whether there had been such fraud as would prevent the plea of settled account.

But reliance is placed on two orders, the first being Ord. XXXI. r. 20 (see *ante*, p. 24). It is said that alters the case, and this motion ought to stand over till the question of settled account is determined. In my opinion this rule 20 does not do more than give the judge a discretion as regards such matters. In some cases it may be perfectly right that when there is a plea which would prevent the necessity of the discovery, which would be a bar to the right of the discovery, that should be settled first. But if that is so, it ought not in the present case to prevent the court from granting the production of these documents. The production is most essential for enabling the plaintiffs to determine, whether that plea is true or false. That being so, if there is here a discretion given to the court larger than it had in former days, this is not a case in my opinion in which that discretion should be exercised by refusing at this stage of the case that production which according to the old practice would have been made. . . . Then Ord. XIX. r. 6 is relied on which says that a party must state in his pleadings, if he relies on fraud, the particulars of that fraud. Here there has been an application for particulars, and that application has been ordered to stand over till the production of those books. Taking the two together, I think that is right. The production of the books will enable the plaintiffs to define and state what it is they require the defendants to meet at the hearing, in order to enable the defendants to meet it (but see *post*, pp. 99, 160). But as according to the old practice in this state of the pleadings an order would have been made for the production of documents material to the question to be tried at the hearing, though at present, from ignorance of what has taken place, the plaintiffs are not able to particularize them, so here the judge was right in saying that he would make an order for the production of the documents and in not confining or restricting it to those documents protection as to which would in no way be gained if the plea were established." Fry, L. J.: "I think the order of the V. C. was wrong. The general scope of the rules and the decisions which has been referred to show that the intention is that discovery, in the first place, should be given only with regard to the matters which first require to be tried, and that, therefore, discovery in the first instance should be confined to the matters which are particularly alleged in the statement of claim. If the trial of the action results in a judgment, the ancillary discovery should be had to assist that judgment (see *ante*, p. 21). The plaintiffs do not condescend to give any particulars with regard to the fraud. . . . Such a mode of statement is not adequate for the hearing of the cause (see *ante*, p. 14). It is not adequate for the purpose of opening a settled account. I come to that conclusion for two reasons. In the first place, I think the old rule of pleading with regard to opening a settled account is well stated in the head note to *Parkinson v. Hanbury*: 'Where a plaintiff seeks to open a settled account there must be in the bill a distinct statement of specific errors in the account.' I think Ord. XIX. r. 6, which prevails now has the same result in this case. It appears to me, in the present case, the rule would require a statement in the pleadings of a particular error or errors, or fraud or frauds or suppression of moneys received: in fact a distinct allegation of the specific error. Therefore I think the pleadings are not adequate for the trial of the particular issue. I think they ought to be made adequate before the relief by way of discovery is given, and that the relief should be confined to the particular matters put in issue." (See *ante*, pp. 13—14, 24, *post*, pp. 98, 99, 161).

See also *Leigh v. Brooks*, W. N. 77, p. 24, an action by an executrix to reopen an account for pictures bought by the testator from the defendant, where the defendant pleading a settled account was held bound to set forth in answer to interrogatories the names of the artists by whom he had represented the pictures to have been painted, the persons from whom he had bought them and other details of the same kind, for a case of fraud was

raised which struck at the root of the whole transaction: see *Rowcliffe v. Leigh*, *ante*, p. 27, where the same dispute was tried in another form.

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Statute of frauds—equitable facts to take the case out of the statute must have been denied by plea and answer: Redes. Pl. 265—269; Dan. Ch. Pr. 566—567: Beames on Pleas, 172: *Denys v. Locock*, 3 M. & C. 205: *Dearman v. Wyche*, 9 Sim. 570: and see *Skinner v. McDouall*, 2 D. G. & Sm. 265. Qu. as to discovery of a parol agreement or declaration of trust: see Redes. Pl. 265—269: see *post*, p. 335, as to discovery of a parol trust under a will.

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The statutes of limitations could be pleaded to bills for relief, and ultimately (see *post*, p. 616) to bills for discovery: *Smith v. Fox*, 6 Ha. 386: *MacGregor v. E. I. Co.*; Dan. Ch. Pr. 532: but all matters charged, as a promise or payment of interest or fraud (including the possession of documents, *Parkinson v. Chambers*, 1 K. & J. 72) to take the case out of the statutes must have been denied by answer: Redes. Pl. 271: Dan. Ch. Pr. 565—566: *Bayley v. Adams*, 6 Ves. 586, p. 598: *Foley v. Hill*, 3 M. & C. 475: *James v. Sadgrove*, 1 S. & S. p. 6: *Pennington v. Beechey*, 2 S. & S. 282: *Cork v. Wilcock*, 5 Mad. 328: *Bickell v. Gough*, 3 Atk. 558: *Harris v. Harris*, 3 Ha. p. 453: *MacGregor v. E. I. C.* 2 Sim. p. 456. Formerly it seems that the plea was not a bar to discovery when the debt became due, for if that had been set forth it might appear that the right of action had accrued within the time: *Bickell v. Gough*, 3 Atk. 558: 2 Sch. & Lef. p. 635: but later decisions were the other way: *Sutton v. Scarboro'*, 9 Ves. 71: *Baillie v. Sibbald*, 15 Ves. 685: and see Redes. Pl. 269. The justice of these later decisions is questioned in Redes. Pl. 270. An issue being whether the right or remedy was or was not barred, the plaintiff should on principle be entitled to all discovery whether by way of production of documents (see for instance *Parkinson v. Chambers*), or by forcing the defendant to answer on oath to the truth of his averment, or of subordinate circumstances, in order to show that it was not barred.

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As to the plea of purchase for valuable consideration without notice, see *post*, Book II. Chap. IV. section 1.

## CHAPTER III.

### PERSONS FROM WHOM AND IN FAVOUR OF WHOM DISCOVERY CAN BE ENFORCED.

SEE as to causes or matters other than actions, *post*, Book III. Chap. V.

Discovery whether by way of interrogatories or of discovery and production of documents can only (except in the cases considered in Section III. *post*) be had from a party to an action: see *Lawton v. Elces*, *post*, p. 63: *Ingram v. Little*, *post*, p. 65: \* and see *post*, Sections II. and III. as to who are parties for the purpose of seeking or giving discovery.

I. The rule that no person without an interest can be made a party for the purpose of discovery.

II. Whether discovery may be had from a party who is not an opposite party—whether the discovery which may be had from a party is limited to that which is relevant to the matters in question between the applicant and the party or whether it extends to discovery relevant to matters in question between the applicant and another party to the action.

III. Who are parties to the action—the extent to which and the means by which discovery may be had from the next friend of a lunatic, person of unsound mind not so found, infant, married woman: the guardian *ad litem* of a lunatic, person of unsound mind not so

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\* By Ord. XXXVII. r. 7, any witness or person may be ordered to be examined on oath and to produce documents whether a party to the action or not. In a recent case, *Central News v. Eastern Telegraph Co.* 50 L. T. 235, it was said that the power given by this section was extremely inquisitorial and would be exercised with great caution: that it would require a strong case to induce the court to exercise such a power over perfect strangers. Similar (but not so extensive, see *ibid.* p. 236) powers were conferred on the common law judges by section 5 of 1 Will. IV. cap. 22, and sections 46 and 47 of the C. L. P. Act, 1854. See as an instance where these latter sections were made use of *Moline v. Tasmanian R. Co.* cited *post*, p. 75.

found, infant: the committee of a lunatic: a married woman: a relator and the Attorney General or the Crown—foreign sovereigns: a corporate or other body: sheriffs: miscellaneous.

I. *The Rule that no Person without an Interest can be made a Party for the purpose of Discovery.*

(A) *The Rule.*—(B) *The Exceptions.*

(A) *The Rule.*

(a) *Generally.*

From the earliest times it has been a general rule (subject to exceptions, see *post*, p. 48) that no person without an interest could be made a defendant to a bill for the purpose of discovery. Such a person was a mere witness and must be called as a witness if his evidence was desired. By “interest” (see *post*, p. 42, as to a particular kind of interest) in a suit for relief (see note \* as to a bill for discovery) was meant such

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\* In regard to a bill for discovery (see generally as to bills for discovery *post*, Book III. Chapter X.) the rule was that it could not be maintained against a person not a party to the record in the action in aid of which the discovery was sought however much he might be interested in the success of the action: *Fenton v. Hughes*, 7 Ves. 287: *Irving v. Thompson*, 9 Sim. 17: *Queen of Portugal v. Glyn*, 7 Cl. & F. 466, reversing *Glyn v. Soares*, 1 Y. & C. 644: *Kerr v. Rew*, 5 M. & C. 154: 9 L. J. Ch. 148: *Hendrie v. Thompson*, Ir. Ch. R. 278: *Manchester Fire Insurance Co. v. Wykes*, 23 W. R. 884: 33 L. T. 142: even though he were named on the record if he were not named as party, as in the case of the assured in an action on a policy: *Kerr v. Rew*, 5 M. & C. p. 164.

But though a person without an interest could not be made a party to a suit for relief for the purpose (see *ante*, p. 20, and *post*, p. 45), a bill of discovery might be filed against a person in order to discover the names of other persons for the purpose of bringing an action against them under some circumstances though it was not alleged that it was intended to make this person a defendant to the action: see *Orr v. Diaper*, 4 Ch. D. 92, action by manufacturers against shippers of similar goods with counterfeit tickets to discover the names and addresses of the consignors, and the amounts dates and other particulars of the shipments in aid of contemplated proceedings, Hall, V.-C. overruling the demurrer, considering them not mere witnesses, and referring to the judgment of Wickens, V.-C. in *Dixon v. Enock* (see as to this *post*, p. 330): *Heathcote v. Fleet*, 2 Vern. 441, bill to discover owner of wharf and lighterman in order to bring an action for damages to goods by upsetting: *Morse v. Buckworth*, *ibid.* bill to discover part owners of ship for the purpose of an action in respect of goods burnt on board: see also *Jones v. Maund*, *post*, p. 45: and *Standen v. Bullock*, *ante*, p. 19: and see further, *post*, p. 614.

an interest as that a decree could be made against him or as that he might be affected by the decree: *Redes. Pl.* 160, 188: *Dan. Ch. Pr.* 143, 257: *Steward v. E. I. Co.* 2 *Vern.* 380: *Wych v. Meal*, 3 *P. W.* 310: *Neuman v. Godfrey*, 2 *B. C. C.* 332: *Cookson v. Ellison*, *ibid.* 252: *Weymouth v. Boyer*, 1 *Ves. jun.* 416: *Cartwright v. Hateley*, *ibid.* 292: *Fenton v. Hughes*, 7 *Ves.* p. 290: *Mayor of London v. Lery*, 8 *Ves.* pp. 403, 405: *Le Texier v. Anspach*, 15 *Ves.* p. 164: *Whitcorth v. Davis*, 1 *V. & B.* p. 550: *How v. Best*, 5 *Madd.* 19: *Kerr v. Rew*, 5 *M. & C.* 154: *Irving v. Thompson*, 9 *Sim.* 17: *Queen of Portugal v. Glyn*, 7 *Cl. & F.* 466: *Manchester, &c. Co. v. Wykes*, 23 *W. R.* p. 885. Persons standing in a situation in which all the court can demand is their testimony in the cause between plaintiff and defendant are not to be made parties, a rule admitting exceptions: *Dummer v. Corp. Cheltenham*, 14 *Ves.* p. 252 (but see *post*, p. 49, as to this passage).

One reason was said to be that his answer could not be read against the other defendants, or any other person: *Redes. Pl.* 188: *Whitcorth v. Davis*, pp. 550—551. But it is a legitimate office of discovery to obtain information which may lead to the obtaining of evidence: see *post*, p. 112. A sounder reason would seem to be that suggested by Lord Eldon in *Fenton v. Hughes*, p. 289, namely, that you have no right to put on the record a person against whom you seek no relief merely in order to deal more effectually with another person: and see *Heatley v. Newton*, *post*, p. 47.

In *Plummer v. May*, 1 *Ves.* 426, Lord Hardwicke thus puts it:—The principle is right that you cannot make one a defendant to a bill who is merely a witness in order to have a discovery of what he can say to the matter, though he is properly examinable as a witness, which would be very mischievous and give an opportunity to collect evidence anyway to contradict and encounter it. But as against a party interested the party is entitled to have a discovery from him if he is charged to be concerned in the fraud in obtaining it, and it is not his being made witness that will prevent the discovery. Lord Eldon in *Fenton v. Hughes*, p. 291 (and so Lord Cottenham in *Kerr v. Rew*, p. 163), regards *Plummer v. May* as being a bill for relief to set aside a will for fraud, to which one of the subscribing witnesses was made a defendant upon a charge of such species of interest as that there might be a decree for an account against him: and see *King v. Martin*, 2 *Ves. jun.* p. 643: and *Redes. Pl.* 235.



And so under the present practice. A mere witness cannot be made a party to an action however essential the discovery which he could give might be to the plaintiff: *Jessel, M. R. in Berry v. Keen*, 26 S. J. 312: and see *Heatley v. Newton*, *post*, p. 47: *Burstall v. Beyfus*, *post*, p. 56: and *Symonds v. City Bank*, 79 L. T. p. 175.

*Berry v. Keen* was an action to recover land: the defendants having said that the legal estate was vested in mortgagees from a testator, and being asked for their names, said that they did not know, but their solicitors did (see as to this point in connection with information of agents *post*, p. 140), having acted for the testator on the mortgage: the court refused an application by the plaintiffs to add the solicitors as parties in order to get the names of the mortgagees to make them defendants (see as to discovery of this nature *ante*, p. 19, and *post*, p. 45), distinguishing *Banner v. Jackson* (discussed *post*, p. 427) on the ground that there the solicitor had possession of the documents, which the plaintiff claimed to be delivered up by way of relief (see *post*, p. 44), and had made himself an active party in the litigation.

In *Symonds v. City Bank*, the defendants having been adjudicated bankrupts after defence, Kay, J. refused to allow the trustee to be added as a defendant merely for the purpose of getting access to the bankrupt's books in his possession: *Day v. Drake* and *Fenton v. Hughes*, *post*, p. 43, were relied on by the plaintiff.

It was no reason for making him a party for discovery merely that production of documents by way of discovery was more effectual than a subp. *duc. tec.*: *Fenton v. Hughes*, 7 Ves. p. 291: *Kerr v. Rew*, 5 M. & C. p. 165: or that in a case where it would be of material importance inspection of goods or other articles could be obtained: *Fenton v. Hughes*.

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(b) *As to what is Interest.*

It has been seen, *ante*, p. 40, that by interest was meant such an interest as that a decree could be made against him, or as that he might be affected by the decree.

A case has been put of a person not having such an interest but having an interest in the question hostile to the ap-

plicant, and withholding evidence on account of such interest. In a case of that kind it has been suggested that such a person might be made a party for the purpose of compelling such evidence, not however by way of discovery: see *Fenton v. Hughes*, 7 Ves. pp. 289—290: and Hare, pp. 75—76: but by way of relief. In *Fenton v. Hughes*, p. 291, Lord Eldon says: “I will not say, as it is not necessary to determine, whether a bill for relief might not be filed against a person on the ground that the examination at law must of necessity be defective for bringing forward all that conscience requires, and that what is withheld is withheld by a person having an interest in the question.” See also *Le Texier v. Anspach*, 15 Ves. pp. 164, 166 (further discussed *post*, p. 51), where Lord Eldon allowed the demurrer of a married woman made a party to a suit for relief against her husband for discovery and production of vouchers, but refused to say what would have been the effect if the bill had prayed delivery of the vouchers as relief against her: (but as to delivery up of documents by way of relief see *post*, pp. 44, 196). The interest of the landlord in disputes between his tenant and third persons has been suggested to be such a hostile interest: it seems at least to have been on grounds of this kind that *Day v. Drake*, *post*, was decided: see Hare, pp. 75, 78: but see *Tooth v. Canterbury*, *post*.

In *Day v. Drake*, 3 Sim. 64, a rector made the Duke of Norfolk, as owner, a co-defendant to a suit for tithes against the occupiers, praying that his right to the tithes might be established and that the Duke might be ordered to pay the costs. In support he charged that the defendants were acting in concert to resist the plaintiff's demands, and that certain documents had been delivered to the Duke in order to prevent the plaintiff from compelling a discovery of them for the purpose of his claim. A demurrer by the Duke having been overruled (pp. 69—72) on the ground that the charge of keeping back the documents must be answered, a demurrer and answer were put in, denying the charge of the documents having been delivered to him but not answering the charge of possession of documents, and on this ground alone (p. 83) Alexander, C. B. held that the demurrer must be overruled.

A wider ground was also taken, pp. 82—83, (referring pp. 67, 68—69, to *Mitchell v. Rabbett*, a bill for tithes against the tenants and a separate bill for discovery against the owner), namely that though in a mere possessory suit for tithes which this was, for no decree could be made in this suit establishing the general right to the tithes pp. 77—78, it was not necessary to make the owner a party, yet if the plaintiff chose to do so the owner could not object and must give all necessary discovery, otherwise the plaintiff would be disappointed of that discovery to which he would be entitled p. 77, but it would be at the plaintiff's hazard as to costs p. 82.

In another case *Tooth v. Canterbury*, 3 Sim. 49, where the lessees of tithes from the rectors the Dean and Chapter of Canterbury had brought a bill for tithe of hops against the occupiers and against the vicar as claiming that tithe, the occupiers filed a cross bill against the dean and chapter and their lessees for discovery and production of documents which would show that the dean and chapter were not entitled to the tithe of hops. The demurrer of the dean and chapter was allowed by Shadwell, V.-C., on the ground that they had no interest in the suit which was a mere possessory one, no declaration of right being sought, in spite of the argument that there would be great difficulty in getting production from them by subp. *duc. tec.*

On p. 63 the Vice-Chancellor points out the extreme inconvenience and mischief that would arise if merely because a tenant in fee makes a lease he is whenever a dispute arises between his lessees and others to be compelled to produce his title deeds not at the request of his lessees but at the request of other persons, not for the purpose of supporting his title but for the purpose of destroying it, and that the case before him was a case of that kind and not like any one of those excepted cases (see *post*, p. 48) alluded to by Lord Eldon in *Fenton v. Hughes*.

This cross bill was it is to be observed a bill for discovery not for relief.

Generally whenever a person wrongfully withholds the production or delivery of documents he may be made a party and relief prayed against him on this ground: see further, *post*, p. 196. An attorney or other agent though he need not be made a party in respect of the possession of the documents of his client or principal, for his possession is the possession of the client or principal (see *post*, p. 194), yet when he wrongfully keeps them in his possession and refuses to produce them or deliver them up, he can properly be made a party and relief in this respect sought against him: *Fenwick v. Reed*, 1 Mer. p. 123: *Bond v. Northor*, 1 Y. & C. 221: *A. G. v. Chesterfield*, 18 Beav. p. 600: *Banner v. Jackson*, cited *ante*, p. 42, and *post*, p. 427: and see *post*, p. 196. See also Lord Eldon in *Le Texier v. Anspach*, *ante*, p. 43: see also the cases cited *ante*, p. 19, and *post*, p. 55: and see as to actions for discovery by way of relief, *post*, p. 276.

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(c) *Where a Person has had an Interest and has parted with it.*

If a plaintiff makes a defendant party by mistake having at the time no interest in the matter in question, yet, as he may have had an interest which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not, and, if the defendant has had

an interest which he has parted with, an answer may also be necessary to enable the plaintiff to make the proper person party instead of the defendant disclaiming: Redes. Pl. 319: and see *Pepper v. Henzell*, *post*: and *ante*, pp. 19, 40, n. as to discovery of names of persons in order to make them parties.

On the general principles discussed *ante*, p. 40, a person could not be made a party solely for the purpose of this discovery: some existing interest in him must be alleged: see *Finch v. Finch*, 2 Ves. p. 493: *Berry v. Keen*, cited *ante*, p. 42: and see *ante*, p. 20. In *Dineley v. Dineley*, 2 Atk. 394, a bill brought to establish a will and seeking discovery of a defendant whether she had any son living of the testator, her demurrer was allowed as being a witness: "You cannot bring a bill here to discover whether there is such a person or where he is in order only to make him a party to a suit in this court": see however as to a bill of discovery with this object, *ante*, p. 40, note\*. And see *Jones v. Maund*, 3 Y. & C. p. 357, where the Lord Chief Baron considered that, where a plaintiff, having assigned his interest to a person, afterward sued as his agent, the defendant might file a bill against both to ascertain the relation in which they stood to one another (see *Wilson v. Church*, cited *post*, p. 46), the community of interest apparently existing between them making it a proper subject of a bill of discovery.

It is said in Redes. Pl. 161, that it had been considered that where a person having had an interest in the subject of a bill has assigned that interest he might yet be compelled to answer with respect to his own acts before the assignment. And reference is made to the case of a bankrupt as an instance. It has however been decided that a bankrupt cannot be made a party for this purpose: see *post*, p. 53; and qu. whether on principle discovery could be had from him after his bankruptcy if no relief can be had against him, whether he has become bankrupt before or after the institution of the suit.

In *Anon. W. N. 76*, p. 38, however a bankrupt having made an affidavit of documents in which he said he had no documents in his power possession or control was ordered to make a further affidavit of documents which had been in his possession and which he had handed over to his trustee, but see *post*, p. 55, as to this case.

In *Pepper v. Green*, *Pepper v. Henzell*, 2 H. & M. 479, 486, it was held that the secretary and manager of a mutual insurance association who was originally a proper defendant to the suit was still so in spite of his having become bankrupt since the institution of the suit, and must give discovery of the names of the members and committee of the association (and see *Redes. Pl. 319, ante*): but in this case it seems that some relief might still have been had from him notwithstanding his bankruptcy.

Certainly under the present practice no person could be made a defendant to a suit for relief for the purpose of discovering his acts before assignment: and qu. whether such discovery could be had from him when he has been made a party for relief and has (in a case in which he could properly do so, see *post* (d)) disclaimed all interest: for he has thereby reduced himself to the position of a mere witness: see *Newman v. Godfrey, post*.

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(d) *The position of a Person who demands that he shall be dismissed from the Action because he has no Interest therein, either on the ground that he had no Interest at the time of Action brought, or on the ground that he has submitted to the Plaintiff's demands as against himself.*

If he is professedly made a party for the purpose of discovery it is clear that he can have his name struck out at once: see *Wilson v. Church*, 9 Ch. D. 552: and *Burstall v. Beyfus, post*, p. 56. But in some cases it may be a matter of difficulty to determine whether he is made a party for the purpose of discovery or whether he is made a party with a view to find out his interest: *Jessel, M. R. ibid.* p. 557.

Where two members of a firm of surveyors, joined as defendants for the purpose of discovery, put in separate answers submitting that they were improperly made parties, they were held entitled to their costs as a matter of course, but only to one set of costs, for they should not have put in separate answers: *Bull v. West London School Board*, 34 L. T. 674.

Where he denies his interest he reduces himself to the position of a mere witness: see *Newman v. Godfrey*, 2 B. C. C. 332: *Chaffers v. Day*, 3 W. R. 263; and therefore, subject to the obligation to give any discovery of the nature of that discussed *ante*, subsect. (c), he has a right to have his name

struck out, or to have further proceedings stayed against him: but see *Heatley v. Newton*, *post*: see also *Burstall v. Beyfus*, *post*, p. 56.

But although he has no interest in the matters of the suit having assigned all his interest (or otherwise), others may have an interest in it against him, as for instance if he is alleged to be an accounting party: *Glassington v. Thwaites*, 2 Russ. 458, p. 462: and see *Bulkeley v. Dunbar*, 1 Anst. 37: *Whiting v. Rush*, cited *post*, p. 68: or if costs are prayed against him: see the cases discussed *post*, (B.) in which persons have been made parties for costs. A party cannot disclaim his liability: *Glassington v. Thwaites*, p. 462: *Dobree v. Nicholson*, 18 W. R. 965.

Where a person was made a party and costs were prayed against him on an allegation that by pretending an interest he had prevented trustees (also defendants) from assigning some property to the plaintiff (the cestui que trust), it was held not sufficient for him to disclaim any interest and say that he had not and never had or pretended to have any interest, but he must answer all the plaintiff's allegations as to the alleged interference with the performance by the trustees of their duty on which the plaintiff founded his title to make him pay costs: *Graham v. Coope*, 3 M. & C. 638, pp. 641, 643: and see *Walters v. Official Manager of Northern, &c. Co.* 1 W. R. 383.

Where a person has been properly made a party and demands that further proceedings may be stayed against him on complying with the plaintiff's demands against him in the action, although a plaintiff cannot (per Lush, J. p. 337: *Baggallay*, L. J. p. 336, refusing to express an opinion) retain persons as defendants merely because he wishes to interrogate or get discovery from them for the purpose of assisting his case against the other defendants, yet (per Lush, J. pp. 337—338) it is a ground for not letting him off summarily (and see *Baggallay*, L. J. p. 336) that there is a great advantage accruing to the plaintiff from being at liberty to interrogate him instead of calling him as a witness; for though the answers cannot be read as evidence as against the other defendants the admissions of a co-defendant, and especially where he is agent of the other defendants, must have an influence on them in determining whether further to defend the suit: *Heatley v. Newton*, 19 Ch. D. 326, where auctioneers (as to whom see *post*, p. 50) were made co-defendants, as

holding the deposit, and for costs, and were allowed to be retained for the purpose of costs: (see further *post*, (B) ).

Under the old practice in equity where no interest (or a mere general allegation that some interest was claimed by the defendant which was not sufficient to prevent a demurrer: *Plumbe v. Plumbe*, 4 Y. & C. 345) was alleged, the proper course was to demur. But if an interest was alleged it must have been denied either by way of disclaimer or plea, not according to the later practice by answer: Dan. Ch. Pr. p. 255: *Cookson v. Ellison*, 2 B. C. C. 252, preferred to *Newman v. Godfrey*, *ibid.* 332: Hare, p. 167: Redes. Pl. 160. But a disclaimer could seldom have been put in alone: some kind of answer had generally to be given: Dan. Ch. Pr. 612: *Oxenham v. Eskdaile*, McCl. & Y. 540: to meet the plaintiff's charges: see *Glassington v. Thwaites*, *ante*.

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## (B) *Exceptions.*

### *The old Practice—The recent Practice.*

#### *The old Practice.*

The exceptions referred to *ante*, p. 40, were in early times supposed to be attornies and other agents implicated in a fraud, auctioneers or agents to sell, bankrupts, arbitrators, officers or members of corporate bodies.

As to the old equity practice of making officers or members of corporate bodies parties for the purpose of giving discovery on their behalf: see *post*, Sect. III. sub-sect. (f).

As to attornies and other agents implicated in a fraud, see *post* (a).

As to auctioneers or agents to sell (and other agents, trustees, married women), see *post* (b).

As to arbitrators, see *post* (c).

As to bankrupts, see *post* (d).

These cases are said to be exceptions; but strictly speaking, except in the case of a bankrupt, they are not exceptions, for costs or delivery of documents were prayed against the



persons, and therefore they were parties against whom a decree might be made. Some of them are exceptions on the footing of the view taken by Lord Eldon in *Dummer v. Corp. Cheltenham*, 14 Ves. p. 252, "persons having no interest to convey give up or receive," but this is to state the rule too narrowly.

(a) *As to Attornies and other Agents implicated in a Fraud.*

Where an attorney or other agent is so involved in the fraud charged by the bill that though a re-conveyance or other relief cannot be prayed against him a court of equity will, rather than that the plaintiff should not have his costs, order that agent to pay them, if he is made a party, the plaintiff must pray that he may pay the costs; otherwise a demurrer will lie: Lord Eldon in *Le Texier v. Anspach*, 15 Ves. p. 164: and see note, Redes. Pl. 160: and Dan. Ch. Pr. p. 254.

In actions brought to impeach deeds for fraud the attornies who prepared them and other persons concerned in obtaining them have been made defendants as parties to the fraud for the purpose of obtaining a full discovery: Redes. Pl. 189: though they have no interest to convey give up or receive: *Dummer v. Corp. Cheltenham*, 14 Ves. p. 252: but relief must have been sought against them in the shape of costs. So in other actions where attornies have so involved themselves in a fraud that, though no other relief was prayed against them, the court would order them to pay costs: Dan. Ch. Pr. p. 254: *Bennett v. Vade*, 2 Atk. p. 327: *Bowles v. Steuart*, 1 Sch. & Lef. p. 227: *Beadles v. Birch*, 10 Sim. 332: *Crofts v. Allmann*, 12 Ir. Eq. R. 451, p. 461: *Roddy v. Williams*, 3 J. & L. 1. It is perfectly true that a solicitor who is implicated in a case of fraud may be made a party to a bill seeking relief in respect of that fraud merely for the purpose of discovery, the only relief asked against him being that he should be ordered to pay costs: Lord Westbury in *Gilbert v. Lewis*, 1 D. G. J. & S. p. 52: and see *Percival v. Blower*, 1 L. J. Ch. 1. So any agent implicated in the fraud: *Bulkeley v. Dunbar*, 1 Anst. 37: *Innes v. Mitchell*, 4 Dr.

p. 97 : *Walsham v. Stainton*, 1 H. & M. pp. 337—338. See as to a married woman implicated in a fraud, *post*, p. 68.

The circumstances or acts constituting the fraud must have been distinctly alleged : *Gilbert v. Lewis*, pp. 49—50 : Dan. Ch. Pr. p. 254 : *Kelly v. Rogers*, 1 Jur. N. S. 514, a bill by a husband against a solicitor for preparing a deed by which his wife conveyed away property previous to her marriage in fraud of his marital rights : *Baker v. Loader*, L. R. 16 Eq. 48 ; and cases there referred to where an attorney was ordered to pay costs.

See as to the kind of fraud necessary to be alleged to bring the attorney within the rule : *Marshall v. Sladden*, 7 Ha. pp. 441—443 : and *Kelly v. Rogers*, *ante*.

See further the subject of an attorney's fraud in connection with professional privilege, *post*, p. 352.

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(b) *As to Agents to sell, Auctioneers : other Agents, Trustees, Married Women.*

There have been cases of agents to sell auctioneers (as to auctioneers see *Cutts v. Thodey*, 13 Sim. 206) &c. made defendants without objection. Whether that arose originally from some interest in them, as holding deposits, that would frequently entitle the plaintiff to relief against them, I do not know : but I cannot deny that such persons have been made defendants where it would be very difficult to say any relief was to be prayed against them at the hearing ; but those cases are upon bills for relief (see *ante*, p. 43) : Lord Eldon in *Fenton v. Hughes*, 7 Ves. p. 289. See now as to auctioneers : *Heatley v. Newton*, 19 Ch. D. 326, cited *ante*, p. 47.

Though an agent as such is not a proper party : Dan. Ch. Pr. pp. 177, 253 (see as to an agent's possession of his principal's documents *ante*, p. 44) ; a trustee is so unless he is a bare trustee without any estate vested in him : see Dan. Ch. Pr. p. 217 : see also as to reading the answer of a trustee against a cestui que trust *Morse v. Royal*, cited Bk. III.

Ch. IX. Sect. V.: and see *post*, p. 60, as to the extent of the discovery obtainable from a person made a party as trustee.

A married woman was not within the exceptions in this respect so as that she could be made party for the purpose of discovery to a suit against the husband for relief: *Le Texier v. Anspach*, 15 Ves. 159. In this case she had acted as agent for her husband in certain contracts the accounts relating to which were the subject of the suit. Lord Eldon, at pp. 164, 166, refused to say what would have been the effect if relief had been sought against her in the shape of a prayer for delivery up of certain vouchers charged to be in her hands (see as to this *ante*, p. 44: and see also *Whiting v. Rush*, cited *post*, p. 68). So in *Barron v. Grillard*, 3 V. & B. 165, a bill for discovery against husband and wife in aid of an action to recover a debt of the wife before marriage which the husband had undertaken to pay, where her separate demurrer was allowed. A further reason for disqualifying her as a party for the purpose of discovery to be used against her husband was, that at that time the evidence of a married woman could not be used against her husband: *Le Texier v. Anspach*, pp. 165—166: 5 Ves. 322, p. 329: Dan. Ch. Pr. p. 167: *Rutter v. Baldwin*, 1 Eq. Ca. Ab. 226: *Barron v. Grillard*.

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(c) *As to Arbitrators.*

In suits to set aside awards arbitrators are not proper parties but are mere witnesses: Redes. Pl. 160: Story, Eq. Jur. § 1500: *Hamilton v. Bankin*, 3 D. G. & Sm. 782: 15 Jur. 70: *Steward v. E. I. Co.* 2 Vern. 380, explained 2 D. G. & Sm. pp. 770—771, misunderstood by Lord Eldon in *Dummer v. Corp. Cheltenham*, 14 Ves. p. 254, and see 2 M. & G. p. 70.

But otherwise if corruption, partiality, fraud, collusion, or other gross misconduct is charged against them: *Tittinson v. Peat*, 3 Atk. 529: *Ives v. Metcalfe*, 1 Atk. p. 64: *Lonsdale v. Littledale*, 2 Ves. jun. 451: *Rybott v. Barrell*, 2 Eden, p. 134: *Hamilton v. Bankin*: *Goodman v. Sayers*, 2 J. & W. 249: Redes. Pl. 160, 261: Story, Eq. Jur. § 1500: and see *Dummer*

*v. Corp. Cheltenham*. In such cases they must have answered the specific facts charged against them, and not merely have denied the general charge: *Padley v. Lincoln Waterworks Co.* 2 M. & G. 68, p. 72: *Lingood v. Croucher*, 2 Atk. 395, p. 396: *Lonsdale v. Littledale*, p. 453: Redes. Pl. 161: and so now they must answer such charges if interrogated: see Dan. Ch. Pr. p. 580: and if the charges were ultimately established, they would be ordered to pay costs: *Lingood v. Croucher*, 2 Atk. 395: *Chicot v. Lequesne*, 2 Ves. 315: Redes. Pl. 160.

In fact that was the true footing on which they might be made parties, that is to say not for the purpose of discovery, but for the purpose of relief, namely the payment of costs on the ground of their misconduct. And therefore costs should be prayed against them: Dan. Ch. Pr. p. 253: and see *ante*, p. 48.

Except under those circumstances and to that extent they are not bound to disclose the grounds of their awards: *Anon.* 3 Atk. 644: Story, Eq. Jur. § 1498: *Ponsford v. Swaine*, 1 J. & H. 433, p. 435: Tayl. Evid. pp. 790—791: and see *Turner v. Goulden*, L. R. 9 C. P. p. 60. An arbitrator if he takes proper means to clear himself from the imputation of fraud is not bound to state the reasons of his award because he is acting as judge and has a right under that character to protection. If however any fraud is imputed he must so frame his defence as to disprove the imputation of fraud, otherwise that takes away the protection which belongs to his character of arbitrator: Lord Cottenham in *Padley v. Lincoln Waterworks Co.* 2 M. & G. p. 71.

They are not exempted from disclosing facts which have been stated before them: Story, Eq. Jur. § 1496, note. As witnesses they may be asked as to what passed before them and what matters were presented to them for consideration, but not what passed in their own minds when exercising their discretionary power: *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418: 5 Ex. 221: 3 Ex. 306: see also *Ellis v. Saltan*, 4 C. & P. 327: see also *Ponsford v. Swaine*, 1 J. & H. 433, p. 435 (where however the award had not been taken up, and also a lien was claimed on certain docu-

ments by them as witnesses). In that case the submission and award were protected from production on that ground, and so reports of engineers and accountants made for their guidance but on the ground apparently that they were not bound to disclose the information which they had consulted: but as to documents belonging to the plaintiff and defendant respectively and handed to the arbitrators it was held that they could not refuse production of them to the respective parties.

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(d) *As to Bankrupts.*

The case of a bankrupt was also attempted to be brought within the exceptions, though by Lord Redesdale principally on another ground, that is to say as a party who had an interest and has assigned it: see *ante*, p. 45.

In Redes. Pl. 161, the position of a bankrupt is thus defined:—a bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees: but it seems to have been generally understood that if any discovery is sought of his acts before he became a bankrupt he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees (and see *Whitworth v. Davis*, pp. 548—549), and otherwise the bankrupt might entirely defeat justice.

The cases however do not support this proposition. The practice of making a bankrupt a party to a suit for relief for the purpose of discovery, though said to be a convenient one especially in a suit for an injunction against the assignees where he might be the only person having a knowledge of the transaction, was never formally established by any decision: *Whitworth v. Davis*, 1 V. & B. pp. 548—551, referring to the above passage from Lord Redesdale.

In a note to Redes. Pl. 161, an exception was said to lie where fraud was charged and costs prayed against him: but see *Gilbert v. Lewis*, 2 J. & H. pp. 455—457, referring to

*Mackworth v. Marshall*, 3 Sim. 368, and *Lloyd v. Lander*, 5 Mad. p. 291.

In *King v. Martin*, 2 Ves. jun. 641, where it was held that he could not demur, a fraudulent and supersedable bankruptcy was charged against the bankrupt and his assignees so that (p. 643) he was a material party against whom a decree might be made: *Whitworth v. Davis*, p. 549: *Gilbert v. Lewis*, 1 D. G. J. & S. p. 45.

In *Gilbert v. Lewis*, p. 45, Lord Westbury however observed that there must be allegations to show that unless the discovery sought were given there would be a failure of justice, otherwise, the relief failing, the discovery must fail also: and at p. 50 in his judgment he says: "I am by no means disposed to hold that a bankrupt who has been engaged in a fraudulent transaction antecedently to his bankruptcy whereby he has acquired property may not be made a party to a bill for discovery even though the property has been transferred by law to the assignee. But then the bill must be constituted for the express purpose of obtaining that discovery from the bankrupt. If the discovery sought from the bankrupt is sought merely as incidental to relief, then he, not being a necessary party in respect of that relief, may demur to the portion of the bill seeking it and therefore to the discovery which is sought merely as incidental to it."

The above observations of Lord Westbury only apply to suits for relief not to bills for discovery: *Manchester Fire Insurance Co. v. Wykes*, 23 W. R. 884, p. 885. A bankrupt could not be made a party with his assignees to a bill for discovery in aid of the defence to an action by the assignees against the plaintiff: *Griffin v. Archer*, 2 Anst. 478: Hare, p. 81: *Whitworth v. Davis*, p. 549: and see *Manchester, &c. Co. v. Wykes*, where a bankrupt was allowed to demur to a bill for discovery against the trustee and himself in aid of the defence to an action by the trustee on the ground that he was not a party to the action: see as to bills for discovery *post*, Book III. Chap. X., and the note *ante*, p. 40.

A bankrupt might file a bill of discovery in aid of his

defence to an action at law: *Lowndes v. Taylor*, 1 Mad. p. 425.

Where relief is prayed against the bankrupt he must of course give the discovery incidental to that relief if the relief is such that it can properly be had against him: but if the plaintiff shows no title to relief against him, the discovery, being incidental to the relief, fails with the relief: *Whitcorth v. Davis*, 1 V. & B. pp. 550—551: *Gilbert v. Leicis*, 1 D. G. J. & S. p. 50, and *ante*: see *Pepper v. Green*, *Pepper v. Henzell*, cited *ante*, p. 46, a peculiar case. Where for instance there was a charge against him for wrongly withholding documents in his possession he could not demur but must answer whether or not they were in his possession: *Gilbert v. Leicis*, p. 51. But there must be a specific charge to that effect. It was not enough to charge generally that he and his assignees had documents in their possession: *Lloyd v. Lander*, 5 Madd. p. 591: nor in a suit by the trustee against the bankrupt and his son that they or one of them &c.: *Weise v. Wardle*, L. R. 19 Eq. 171. But he could not be made a party merely in respect of the possession of documents for his possession is the possession of the trustee: *Gilbert v. Lewis*, pp. 50—51: (but see *Rodick v. Gandell*, 10 B. 270): and see *ante*, p. 44. Qu. on this ground as to the order in *Anon.* W. N. 76, p. 38, referred to *ante*, p. 45.

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*The recent Practice* (see *ante*, p. 48).

The current of recent opinion has however set very strongly against this practice of making these various persons parties. Lord Cottenham in *Attwood v. Small*, 6 Cl. & F. 232, p. 353, considered that the practice ought never to be resorted to, except in some very extreme case where there was really a fear of losing the costs: and that where that was not the case it could not be resorted to except for the purpose of injustice: and Wigram, V.-C. in *Marshall v. Sladden*, 7 Ha. p. 441, was of the same opinion.

In *Barnes v. Addy*, L. R. 9 Ch. p. 255 (and see *Hutchins v.*



*Hutchins*, I. R. 10 Eq. p. 458) Lord Selborne comments on the practice of making agents parties: "I repeat what I said during the argument that I have been under the impression and I hope the impression will go abroad that of late years the court has set its face against making solicitors or others who are properly witnesses who are not chargeable with any part of the relief prayed parties to the suit with a view to charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose unless other and further relief might also be given against them." And referring to this passage Lord Selborne in *Burstall v. Beyfus*, 26 Ch. D. 35, p. 40, adds that if they cannot be made parties to pay costs, *à fortiori* they cannot be made parties for the mere purpose of making discovery: and see Cotton, L. J. *ibid.* pp. 41—42: and accordingly the names of the solicitors were struck out.

In *Weise v. Wardle*, L. R. 19 Eq. p. 172, Jessel, M. R. discusses the subject. The action was by the trustee against the bankrupt and his son to set aside an alleged fraudulent conveyance by the father to the son. "The real ground of demurrer is that the bankrupt ought not to be a party to the suit. The charge is that the bankrupt has conveyed away part of his property so as to defeat or delay his creditors. Now in respect of that property he has no interest nor is he under any personal liability: why then is he made a defendant. It is said that he has been party to a fraud and that he may be made a defendant for the purpose of discovery and payment of costs. Now it is true that there is a rule that a mere agent may in certain cases be made a party to a suit but that rule has been disapproved of by eminent judges in several cases. Sir J. Wigram in *Marshall v. Sladden*, p. 441, speaks of the practice as a practice of a very anomalous character. Lord Cottenham in *Attwood v. Small*, pp. 352—354, pointed out various objections to it. It is obvious from the tenor of his lordship's observations that he disapproved of the practice and that he would probably have advised the House of Lords to overrule it had an opportunity presented itself: at all events it is plain that the practice is not to be extended.

I consider that the practice as it now exists applies only to cases in which the defendant is an agent (under which term is included the case of his being an attorney or solicitor) or an arbitrator: this defendant is neither: and the demurrer therefore must be allowed with costs."

See also Jessel, M. R. in *Mathias v. Yetts*, 46 L. T. p. 502; and in *A. G. v. Vestry of Bermondsey*, 23 Ch. D. p. 67: refusing to extend the rule of the three A.'s (attorney, agent, arbitrator) to members of corporations or vestrymen.

See however as to an auctioneer *Heatley v. Newton*, 19 Ch. D. 326 (cited *ante*, p. 47).

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II. (a) *Whether Discovery may be had from a Party who is not an Opposite Party*: (b) *whether the Discovery which may be had from a Party is limited to that which is relevant to the Matters in question between the Applicant and the Party or whether it extends to Discovery relevant to Matters in question between the Applicant and another Party to the Action.*

(a)

(1) *Interrogatories.*

See *post*, Sect. III. as to who are parties.

Ord. XXXI. r. 1, gives to a party (that is to say a plaintiff or defendant, see *post*, p. 61, as to the definition of these words under the Jud. Act) the right only to interrogate an opposite party or parties.

This phrase "opposite party or parties" means not a party or parties having an adverse interest but a party or parties between whom and the applicant an issue is (or may be) joined: *Molloy v. Kirby*, 15 Ch. D. 162, p. 164.

A defendant to a counterclaim therefore cannot interrogate the plaintiff in the action, unless he get himself made a defendant in the action under Ord. XVI. r. 11, for there is no issue between them: they are co-defendants to the counterclaim: *ibid.*

(2) *Discovery and Production of Documents* (see *ante*).

See *post*, Sect. III. as to who are parties.

By rule 14 of Ord. XXXI. any party to the cause or matter may be ordered to produce documents: by rule 12 any party may apply for an order on any other party to the cause or matter for an affidavit of documents. Qu. whether on principle these rules should receive any wider interpretation than that given to the rule relating to interrogatories (see *ante* (1)) so far as regards applications before decree. A party is a mere witness as to matters that are not in question between himself and another party: and if there are no matters in question between them he is altogether a witness. And if that is so, on what principle can discovery be required of him (see *ante*, p. 40)? See also further *post*, p. 59, as to discovery being limited to matters in question between the party and the applicant.

Co-defendants may after decree undoubtedly, see Bk. III. Ch. IV. obtain discovery and production from one another: but qu. whether except in cases where there is some matter in question between them.

In reference to the want of any provision for discovery or production of documents from co-defendants in the Chancery Procedure Act, Lord Hatherley (see *A. G. v. Clapham*, *post*) observes that it was thought proper that such a case should be left to the operation of the ordinary course of proceeding by a cross bill: but qu. whether a cross bill of discovery could be filed against a co-defendant if there were no matter in question between them.

Jessel, M. R. in *Molloy v. Kirby*, 15 Ch. D. p. 164, refers to the distinction in language between rule 14 and rule 1 as to interrogatories; and in *Quilter v. Heatley* (according to the report in 48 L. T. p. 375, but not in 23 Ch. D. 42) the same judge in reference to rule 15 (see *post*, p. 240) says, that a defendant may give notice to his co-defendant, and that the rule does not apply only as between plaintiff and defendant. On the other hand in *McAllister v. Rochester*, 5 C. P. D. 194, p. 210, the plaintiff obtained an order for discovery of documents on third parties brought in by the defendant but who had obtained an

order to defend under Ord. XVI. r. 11, on the ground that they became by virtue of this order persons litigating with the plaintiff (and see Thesiger, L. J. *Molloy v. Kirby*, p. 165) : and correspondingly they would have a right to discovery against the plaintiff. See also *Benyon v. Godden*, W. N. 77, p. 257 (cited Bk. III. Ch. IX. Sect. VIII.), where an application was made by the plaintiff for production for the purpose of an appeal of certain accounts put in by third parties at the trial.

The Chancery Procedure Act did not provide for any application by one defendant against his co-defendant for discovery or production of documents. It was thought to be proper that such a case should be still left to the operation of the ordinary course of proceeding by a cross bill (but see *ante*) : Lord Hatherley in *A. G. v. Clapham*, 10 Ha. App. p. 69 : and see *Wynne v. Humbertson*, 27 Beav. p. 424 : but otherwise after decree *Hart v. Montefiore*, 30 Beav. 280 : and see *post*, Bk. III. Ch. IV.

The expression "opposite party" was used in sect. 6 of the C. L. P. Act, 1851 in reference to inspection, and in sects. 50 and 51 of the C. L. P. Act, 1854 in reference to the affidavit of documents and interrogatories.

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(b) See *ante*, p. 57.

Here again (see *ante*, p. 58), on the principle that a party is a witness as to matters which are not in question between himself and the applicant, it would seem that he cannot be required to give discovery which is relevant only to matters in question between the applicant and some other party to the action. And the practice in equity seems to have been so.

Discovery must be given by a defendant if relevant to any part of the case against himself : see *Taylor v. Milner*, 11 Ves. p. 43. A suit in equity being several and distinct against each defendant, each was in strictness a defendant so far as the suit was a suit against him, and a witness as to the residue of the bill : so far as the bill applied to other parties only the allegations in the bill were immaterial : Wigr. Pl. 235.

A discovery may be material to the plaintiff's general case if made by one of the defendants which would be wholly irrelevant if made by another : in such cases the defendant from whom the discovery would be immaterial is not obliged to make it : and in general a defendant is only obliged to answer

such of the interrogatories as are necessary to enable the plaintiff to obtain a complete decree against him individually: Dan. Ch. Pr. p. 625.

Mr. Hare p. 160 lays down this proposition in narrower terms: "Though very little of definite authority appears in the books on the subject it is unquestionably consistent with principle that a defendant should not be required to answer respecting the transactions of other persons on the record when he is not charged with knowledge interest or participation," referring to *Richardson v. Hulbert*, 1 Anst. 65: *Draper v. Jason Finch*, 240: *Glassington v. Thwaites*, 2 Russ. 458: *Williams v. Leighton*, 2 Tot. Trans. 9: and see *Marsh v. Keith*, *post*.

That the answer of one defendant could not be read against another: Redes. Pl. 161, 188: *Whitworth v. Davis*, 1 V. & B. pp. 548—549: is not perhaps conclusive: see *ante*, p. 41, and *post*, p. 112.

A trustee or incumbrancer interested only in part or heir at law always answered to so much of the bill as applied to him and need not answer the rest: *Agar v. Regent's Canal Co.* Cooper, p. 215: Wigr. Pl. 235. In *Marsh v. Keith*, 1 Dr. & Sm. 342, it was said (p. 348) in reference to a claim by a defendant trustee to refuse discovery as immaterial to any relief against himself; "all that is asked specifically against him is an injunction and the appointment of a new trustee. But in truth the whole relief sought by the bill is asked against him. It may not be hostile relief: but as trustee he is involved in the whole of the relief asked:" and see *Walters v. Official Manager of Northern, &c. Co.* 1 W. R. 383: see also as to a trustee, *post*.

As regards actual authority, the point was raised in a recent case of *Whitham v. Whitham*, 28 S. J. 456, but Pearson, J. refused to decide it. The action was by cestuis que trustent against a trustee and the representatives of deceased co-trustees to compel them to make good trust monies which the defendant trustee had with the concurrence of his co-trustees employed in his business. The plaintiffs were held entitled to an order on the trustee for production of his business books on two grounds, first that it would be material to enable them to elect whether they would take a judgment for the monies with profits or with interest, second that it would show that the co-trustees might have recovered the trust monies from the defendant if they had sued, and therefore their estates were liable, and this being so, it was not necessary to decide whether a defendant could be compelled to produce documents not material to any issue between himself and the plaintiff but only to enable the plaintiff to obtain judgment on an issue between the plaintiff and another defendant, for a trustee could not refuse to produce documents the production of which would have the effect of saving the trust estate from loss: (and see *Areling v. Martin*, *post*, Bk. III. Ch. VII. Sect. II.)

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III. *Who are Parties to the Action, and their position in regard to Discovery—the extent to which and the means by which Discovery may be had from* (a) *the next Friend of a Lunatic, Person of Unsound Mind not so found, Infant, Married Woman*: (b) *the Guardian ad litem of a Lunatic, Person of Unsound Mind not so found, Infant*: (c) *the Committee of a Lunatic*: (d) *a Married Woman*: (e) *a Relator and the Attorney General or the Crown*—*Foreign Sovereigns*: (f) *Corporate or other Bodies*: (g) *Sheriffs*: (h) *Miscellaneous*.

Discovery may then subject to the considerations contained in the previous section be enforced in favour of and against any party (plaintiff or defendant in the case of interrogatories, see r. 1, *ante*, p. 57).

“Plaintiff” is defined (section 100 of the Jud. Act: and Ord. LXXI.) to include every person asking any relief (otherwise than by way of counter-claim as defendant) against any other person by any form of proceeding, whether action, suit, petition, motion, summons, or otherwise: “defendant” every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings: “party” every person served with notice of, or attending any proceeding, although not named on the record.

See as to who are parties the various cases considered *post* in this section.

See as to the persons in favour of whom and from whom discovery can be obtained after decree in chambers, *post*, Book III. Chap. IV.

See as to discovery in causes or matters other than actions, *post*, Book III. Chap. V.

As regards the position of a plaintiff who is personally incapacitated from giving discovery on oath the following observations of Lord Cairns are important. “It is in my opinion an error to suppose that the right of a plaintiff to sue depends in any way on the effectiveness of the discovery which on a cross bill can be extracted from him. From an infant lunatic a representative trustee or executor wholly ignorant of

the occurrences which are the subject of the suit no practical discovery can be obtained, and yet they can maintain a suit. I apprehend that the only rule is that the person state or corporation which has the interest must be the plaintiff, and the court will do the best the law admits of to secure to the defendant such defensive discovery as he may be entitled to :” Lord Cairns in *U. S. A. v. Wagner*, L. R. 2 Ch. pp. 594—595 : so Lord Chelmsford, *ibid.* p. 587 “I am not aware of any authority for saying that a party is disabled from suing because you cannot get discovery from him.”

As regards the position of any party, whether plaintiff or defendant, who is personally incapacitated from giving discovery on oath it may be pointed out that the difficulty has in some cases been got over by making an order not directly against a person who is not a party (for qu. to what extent this is permissible even in the case of an officer or member of a corporate body, see *post*, pp. 77, 85) but against the party that some other person shall give the discovery on his behalf : see as to a corporation, *post* (f) and particularly *Ranger v. G. W. R. Co.*, cited *post*, p. 85, as to the words “on oath” in sect. 18 of the Chancery Procedure Act not necessarily being limited to the oath of the party himself : see also *Crouce v. Bank of Ireland*, cited *post*, p. 64 (infant by next friend) : *Higginson v. Hall*, cited *post*, p. 64 (person of unsound mind by next friend) : and by visiting any default in compliance with the order upon the party himself in respect to his proceedings in the action : see for instance *Republic of Liberia v. Roye*, *post*, p. 86.

In an action upon a policy of marine insurance the usual order upon the plaintiff for production was in order to save delaying the action varied by dispensing with his oath and substituting the oaths of the wife who carried on the business in England and commenced the action by his authority and of the attorney : *Barnett v. Hooper*, 1 F. & F. 412 : 467.

See generally as to discovery of documents from a plaintiff in such actions, *post*, Book III. Chap. II.

By consent an affidavit of documents, as to which the de-



fendant, an old and infirm lady, knew nothing, was made by her solicitor: *Original Hartlepool, &c. Co. v. Moon*, 30 L. T. 193.

(a) *Next Friend of a Lunatic Person of Unsound Mind not so found, Infant, Married Woman.*

Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner defend by their guardians appointed for that purpose. Married women may sue and be sued as provided by the Married Women's Property Act, 1882, Ord. XVI. r. 16.

Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose, Ord. XVI. r. 17.

The rules as to admissions in the pleadings do not apply as against an infant, lunatic, or person of unsound mind not so found by inquisition: see Ord. XIX. r. 13.

The next friend cannot it is conceived be interrogated any more than discovery of documents can be had from him: and see *post* (b) as to a guardian ad litem.

The next friend (see further *post* (d) as to the next friend of a married woman under the old practice) is not a party to the action so that an order for discovery or production of documents in his own possession or power can be made against him: see Kay, J. in *Lawton v. Elwes*, 48 L. T. 425: 31 W. R. 414: 52 L. J. Ch. 399 (where however it may be noted that the definition of "party" in section 100 of the Jud. Act, see *ante*, p. 61, was not cited, but qu. whether it applies to a next friend, though see as to a guardian ad litem *post*, p. 65): and see *Hardwick v. Wright, post*.

In *Lawton v. Elwes* the application was altogether of an unusual charac-

ter. The action was for administration by an infant appearing by three next friends: a dispute having arisen between the three next friends respecting the infant's maintenance, K., constituting himself a voluntary next friend for this purpose, took out a summons for removal of two of the next friends, and in support of such summons applied against them for production of their bankers' pass-book containing the items for maintenance and also that they should be ordered to make an affidavit of documents relating to the matters in question in the action; the application was refused even regarding the application as made on behalf of the infant.

So in *Hardwick v. Wright*, 11 Jur. N. S. 297: 13 W. R. 560, an application by the defendant that the next friend of the plaintiff (a married woman), and a co-defendant (her husband) should be ordered to make an affidavit as to documents in their possession or in the possession of either of them was refused, Stuart, V.-C. holding that the act did not authorize an order requiring a next friend or relator (see as to a relator, *post* (e)) at a defendant's instance to make an affidavit. See this case further discussed *post*, and *post*, p. 67.

The next friend may of course be called as a witness and subpoenaed to produce any documents: *Laiston v. Elwes*.

Qu. whether a bill of discovery could be filed against him as seems to have been suggested in *Hardwick v. Wright*: see *ante*, p. 59.

But though no order can be made against a next friend for discovery or production of documents in his own possession it is legitimate to order at a defendant's instance that the plaintiff shall file an affidavit as to documents in his possession to be made by the next friend and for production of the documents so disclosed: see *Crouce v. Bank of Ireland*, 19 W. R. 910 (the plaintiffs being infants, and following the principles laid down and the form adopted in *Ranger v. G. W. R. Co.* as to which see *post*, p. 85, and distinguishing *Hardwick v. Wright*, *ante*, on the ground that there the plaintiff a married woman had herself already made an affidavit, and as to which case it may also be noted that what was asked for was an affidavit of documents in the possession of the next friend and husband): and *Higginson v. Hall*, 10 Ch. D. 235 (the plaintiff being a person of unsound mind, and Malins, V.-C. holding that on broad principles the defendant was entitled to have an affidavit of documents in the plaintiff's possession made by the next friend or some other person on the plaintiff's behalf, as in *Republic of Liberia v. Roye*, see *post*, p. 86, where the order was in the same form as *Ranger v. G. W. R. Co.*, and ordering that one should be made by the next friend): and see *ante*, p. 62: but Little, V.-C. of

Lancaster refused to follow *Crowe v. Bank of Ireland : Dimoline v. Ward*, Annual Practice, p. 333.

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(b) *A Guardian ad litem of a Lunatic, Person of Unsound Mind not so found, Infant.*

A guardian ad litem cannot under the present practice be interrogated. The definition of "party" in sect. 100 of the Jud. Act (see *ante*, p. 61, and see also the definition of plaintiff and defendant in the same section) is ~~sufficiently~~

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65. *To follow second line from top.*

So also contra in a recent case of *Dyke v. Stephen*, 29 S. J. 638: 33 W. R. 932, where Pearson, J. refused to stay proceedings until the next friend of an infant plaintiff had made an affidavit of documents: as to *Crowe v. Bank of Ireland*, recognizing no analogy between the case of a corporation and an infant: as to *Higginson v. Hall*, inferring that the order was practically by consent: and considering that as the next friend was not a party, and therefore no order could be made against him, the effect of making such an order as was asked for would be to make the infant's rights dependent on the conduct of the next friend (in answer to which it may be suggested that the interests of the adversary ought also to be consulted, and that in the event of the next friend refusing to make an affidavit the court could appoint another next friend).

See also *Gason v. Garnier* and *Micklethwaite v. Atkinson*, *post*, p. 66: the observations of Cairns, L., *ante*, pp. 61, 62: and *Cardicell v. Tomlinson*, *ante*, p. ivb. In *Fendall v. O'Connell* (cited *post*, p. 66) the husband had been also ordered to make an affidavit of documents on behalf of infant co-plaintiffs.

The answer of a guardian ad litem of an infant could not be read against the infant because it was not his answer but of the guardian who was sworn; and the infant might know nothing of the contents: *Wrottesley v. Bendish*, 3 P. W. p. 237: *Eccleston v. Petty*, Carth. 79. Whatever admissions the answer contained the whole case must be proved against the infant: *Holden v. Hearn*, 1 Beav. p. 455: 3 Jur. 428: and see now Ord. XIX. r. 13, *ante*, p. 63. Nor could exceptions be taken to it for insufficiency: *Redes*, Pl. 314: *Lucas v. Lucas*, 13 Ves. 274: *Savage v. Carroll*, 1 Ball & B. p. 553: *Copeland v. Wheeler*, 4 B. C. C. p. 256: *Strudwick v. Pargiter*, Bunb. 338.

The guardian only swore that he believed so much of the answer of the infant defendant as concerned the said infant to be true: *Braithw. Pr.* 393—394.

The later practice was not to require an answer from an infant: *Dan. Ch. Pr.* 153.

Qu. whether these considerations apply to discovery or production of documents. See *ante*, pp. 63—64 as to discovery and production from a person suing by a next friend.

In *Gason v. Garnier*, 1 Dick. 286, the defendant becoming impaired in his mind after the decree had a guardian appointed him by whom he might produce books, &c.

In *Micklethwaite v. Atkinson* (cited *ante*, p. 65) the V. C. (p. 175) doubts whether, if the guardian's answer (the guardian was also a defendant) had admitted documents in his possession or in the possession of the defendant of unsound mind, an order for production would have been a matter of course.

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### (c) *Committee of a Lunatic.*

See Ord. XVI. r. 17, *ante*, p. 63 continuing the old chancery practice: and Ord. XIX. r. 13, *ante*, p. 63 as to admissions.

Where a lunatic sued by his committee, the committee must have been a co-plaintiff: *Dan. Ch. Pr.* p. 80.

When a suit was brought against a lunatic, the committee must have been a co-defendant unless he was a plaintiff: where he was co-defendant the lunatic defended by the committee as his guardian, unless the committee had an adverse interest: the lunatic and committee put in a joint answer: *Dan. Ch. Pr.* pp. 158—159, 161.

It is said in *Dan. Ch. Pr.* p. 742 that the answer of an idiot or lunatic put in by his committee might be read against him: but in *Percival v. Caney*, 4 D. G. & Sm. pp. 616, 625: 14 Jur. 1056 it is doubted whether it can be

67. *Under head "Married Women."*

Where husband and wife (suing in respect of her separate estate without a next friend) are co-plaintiffs a defendant is, under the present practice, entitled to an order for an affidavit of documents by them in the same form as against any other co-plaintiffs, that is to say, "whether they or either of them . . . in the possession of them or either of them" (see *post*, p. 87): so held by the Court of Appeal in *Fendall v. O'Connell*, 29 Ch. D. 899: 52 L. T. 553: 33 W. R. 619: 54 L. J. Ch. 756, where husband and wife had different interests (successive life interests), and where, an order having been made in the above form and an affidavit put in "we have in our . . . we have not in our . . .," the affidavit was held to be not in compliance with the order and therefore insufficient; for the wife might have documents relating to her separate estate in her actual possession which would form part of her separate estate, and would not be in any sense in the custody of the husband and wife: and so also there might be documents in the separate possession of the husband.

*v. Owen*, cited *post*, p. 88.

See as to discovery of her separate property, *post*, p. 114.

See as to making the wife a party for the purpose of discovery, *ante*, p. 51.

The following points in the old chancery practice may be noted.

The position of the next friend has already been discussed *ante*, p. 63. There was a distinction between the position of the next friend of a married woman and of an infant or person of unsound mind, namely, that the married woman selected her own next friend, whereas any person might file a bill as next friend of an infant: Dan. Ch. Pr. pp. 103—104. In a case where a wife sued by her next friend, her husband being a defendant, an affidavit of documents was made by her: see *Hardwick v. Wright*, *ante*, p. 64. Where husband and wife sued as co-plaintiffs together or where the husband sued as next friend of his wife the suit was regarded as the suit of the husband alone: Dan. Ch. Pr. p. 102.

The wife could not (and cannot) be compelled to answer so as to criminate her husband nor the husband his wife, see *post*, p. 342.

But since the passing of the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), it can no longer be a ground for not answering that she cannot be admitted to answer so as to charge her husband: see *Rutter v. Baldwin*, 1 Eq.

Ca. Ab. 227: *Cole v. Gray*, 2 Vern. 79: and see also *ante*, p. 51, referring to *Le Texier v. Anspach*, and *Barron v. Grillard*.

The husband must as a rule have been made a co-defendant with the wife: and a joint answer must have been put in by them unless an order was obtained to answer separately. An order to answer separately might be obtained under various circumstances: it might be obtained where their interests were adverse, where the suit related to her separate estate, where she disapproved of the husband's defence. The wife was liable for not putting in her separate answer under such an order: unless such an order was obtained the husband was alone liable for the wife's refusal or omission to answer fully: Dan. Ch. Pr. pp. 162—167, 422—423, 447—448.

See as to a separate affidavit of documents by the wife *Hartley v. Owen*, cited *post*, p. 88.

The wife as well as the husband must answer fully: *Wrottesley v. Bendish*, 3 P. W. 236: *Whiting v. Rush*, *post*. The court requires a full answer from her as it may be of great use in enabling the plaintiff to frame his interrogatories and to know where he may procure evidence: *Glascott v. Copper Miners' Co.*, 11 Sim. p. 311 *arguendo*: (see as to this office of discovery, *post*, pp. 113, 185). In *Whiting v. Rush*, 2 Y. & C. 546, a married woman and her husband were made defendants to a bill charging them with fraud in obtaining certain policies, and praying for their delivery up to be cancelled. The husband being out of the jurisdiction the wife put in a separate answer in which she disclaimed all interest, said that she had no separate property (see as to discovery of separate property, *post*, p. 114), and denied the fraud. The answer was held insufficient, for relief was prayed against her, and, citing *Glassington v. Thwaites* (see *ante*, p. 47) a party could not by disclaimer get rid of his liability to answer, and, citing *Wrottesley v. Bendish*, *ante*, both husband and wife must answer fully, though whether her answer could ultimately be read against her (see *post*) was another question. In *Pemberton v. McGill*, 1 Jur. N. S. 1045, a suit for account and to carry out the trusts of a will against a married woman, being executrix and one of the residuary legatees, she was compelled, her husband being out of the jurisdiction, to answer as to the sale and application of the proceeds of certain property part of the testator's assets: for, though it might be impossible in the case of a married woman misconverting the assets to enforce personally any decree against her, she should not be permitted to plunder the estate without being liable to account, or to plead her coverture to commit a gross fraud.

The joint answer might be read against the wife as regards her separate estate: Dan. Ch. Pr. p. 168, citing *Callow v. Howle*, 1 D. G. & S. 531: 11 Jur. 984: *Clive v. Carew*, 1 J. & H. p. 207: 5 Jur. N. S. 487: and also against them both in a suit relating to the wife's personal property for the purpose of fixing them with the admissions: but not where it related to the inheritance of the wife: Dan. Ch. Pr. p. 168, citing *Evans v. Cogan*, 2 P. W. 449: *Merest v. Hodgson*, 9 Pri. 563: *Elston v. Wood*, 2 M. & K. 678.

As a general rule the separate answer of a married woman might be read against her: Dan. Ch. Pr. p. 168: but her admission whether in a joint or separate answer did not enable the court to establish a will or bind her inheritance against her: *Brown v. Hayward*, 1 Ha. 432: and see *Wrottesley v. Bendish*, 3 P. W. 236, where Lord Talbot refused to give an opinion as to whether her answer could be read against her when discoverd or not.

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(e) *Relators — Attorney - General or the Crown — Foreign Sovereigns.*

*Relators.*

It is conceived that the position of the relator and A. G. is the same as under the equity practice: though it is considered

in Seton, p. 148 that under the Jud. Act, sect. 100 : Ord. I. r. I. : Ord. LXXI. : relators may be called upon to produce as plaintiffs.

The position of the relator and A. G. in an information in equity was as follows :—

The relator in an information (unless co-plaintiff as having an interest, see Dan. Ch. Pr. 14 : *A. G. v. Castleford*, 21 W. R. 117 : when in that capacity he is of course liable to give discovery) was not a party : the A. G. was the party : *A. G. v. Ironmongers Co.* 2 Beav. pp. 328—330 : *A. G. v. Wright*, 3 Beav. 447. The relator was on the record as security for the costs of the information : *A. G. v. Clapham*, 10 Ha. App. p. 69 : *A. G. v. Ironmongers Co.* p. 328 : Dan. Ch. Pr. p. 15. He is answerable for the propriety and conduct of the proceedings : Redes. Pl. 22. The A. G. allows the relator to conduct the case on his behalf : see *A. G. v. Governors, &c. of Sherborne School*, 18 Beav. p. 264.

No discovery or production of documents could be obtained from a relator under sect. 20 of the Chancery Procedure Act, at the defendant's instance : *Hardwick v. Wright*, 11 Jur. N. S. 297 : *A. G. v. Clapham*. Nor would an information be stayed until production of certain documents by the relators (and co-defendants : see as to these, *ante*, p. 58) : *ibid.* In *A. G. v. Clapham*, 10 Ha. App. 68, Stuart, V. C. considered that it was wholly without precedent to call upon relators for production of documents, that there was not before that act any jurisdiction in the court to make the order sought, that that act had introduced no alteration of practice favourable thereto, that it was not thought necessary to make any provision for the case of an information, for it would be improper attending to the position of the A. G. that there should be any rule requiring him to produce documents in his possession or power (see as to this, *post*, p. 70), that the legislature had reposed confidence in his discretion in the institution and control of informations, and that if the defendant complained to him that the parties actively proceeding with the suit had in their possession information the knowledge of which would be beneficial to the defendant and



promote a right determination of the question in dispute, the A. G. would if he came to that conclusion take care to give directions to further the ends of justice and properly protect the defendant.

In a case cited in a note to Dan. Ch. Pr. p. 1682 an affidavit of documents was ordered to be made by the relators or one of them or the informant's solicitor, he consenting.

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*The Attorney General or the Crown.*

There is no reason to suppose that the Attorney General as representing the Crown (or any other public officer representing it) is any more bound to give discovery under the present procedure than he was in chancery. See *The Helvetia*, W. N. 79, p. 48, where the Lords Commissioners of the Admiralty consented to give certain information but did not admit that any order could be made against them. See *post*, p. 71 as to his answer in chancery. It is clear that in no case could he be required to give discovery on oath. It was an exception of principle. It arose from the dignity of the Crown to which the court was obliged to have regard and accordingly officers of the Crown in this country were not put to make discovery on oath: there was no instance of his being obliged to answer on oath: Wickens, V.-C. in *Prisleau v. U. S. A. L. R.* 2 Eq. p. 664, referring to *A. G. v. Brooksbank*, cited *post*, p. 71. The answer (see *post*) of the A. G. was put in without oath though usually signed by him: Dan. Ch. Pr. p. 128.

*Qu.* whether discovery could be obtained by petition of right: see the suggestion in *Deare v. A. G.* *post*: and *post* as to a petition of right.

In reference to the omission of the Chancery Procedure Act to make any provision for discovery of documents in favour of the defendant to an information Lord Hatherley observed that it would have been improper according to the position of the A. G. that there should be any rule requiring him to produce documents in his possession or power: *A. G.*

*v. Clapham*, 10 Ha. App. 70 : and see further as to the position of the A. G. in an information *ante*, p. 69. See however *A. G. v. Brooksbank*, 1 Y. & J. 439 (cited in *Prisleau v. U. S. A. L. R.* 2 Eq. p. 664) an information for discovery of accounts against an army agent where proceedings were stayed until production (not on oath, see further *post*) of certain vouchers and accounts, charged to be in the possession of the Secretary of War, for the purpose of enabling the defendant to amend his plea of settled accounts : see a similar case *Deare v. A. G. post*, p. 72.

In *Thomas v. Reg.* L. R. 10 Q. B. 44, it was held that section 50 of the C. L. P. Act, 1854, did not extend to petitions of right so as to enable the suppliant to obtain discovery of documents from the Crown, no provision being made therefor as in the case of a corporate body. This decision was referred to in *Tomline v. The Queen*, 4 Ex. D. 252, but the court expressly refused to consider whether it was correct, Bramwell, L. J. p. 256, suggesting that possibly the legislature had left the difficulty in existence in order that it might be in the Crown's discretion whether it would afford the information sought by the suppliant. A bill of discovery would not lie in aid of a petition of right : *Reiner v. Salisbury*, 2 Ch. D. p. 386.

But the Crown's right to discovery against the subject is the same as in a suit between subject and subject : *A. G. v. Corp. London*, 2 M. & G. p. 258. And so even in a petition of right under section 7 of the Petitions of Right Act, 1860, although technical reasons may exist which prevent a reciprocal right in the suppliant : *Tomline v. The Queen*, pp. 255—256, where the application was for discovery of documents under rule 12, see *ante*.

As to his answer in equity.

The old practice where the A. G. was made defendant to a suit in equity as a public officer of the Crown was for him to put in a merely formal general answer claiming on behalf of the Crown such rights and interests as it should appear to have in the matters in question and praying that the court would take care of them : Dan. Ch. Pr. p. 128 : *A. G. v. Lambwith*, 5 Pri. p. 398 : *Davison v. A. G.* 5 Pri. p. 398, n. This formal answer (put in without oath but usually signed by him, see *ante*) could not be excepted to : *ibid.* : even an answer to a bill for discovery of matters alleged to be mate-

rial to the plaintiff's defence in an information pending against him : *Davison v. A. G.* It was entirely in his discretion whether he would put in a full answer : Dan. Ch. Pr. 128 : *Davison v. A. G.* : where the interest of the Crown or purposes of public justice required it he would put in a full answer : Dan. Ch. Pr. p. 128, citing *Colebrooke v. A. G.* 7 Pri. 192 : and see *Deare v. A. G. post.* He might as in the case of infants state anything he meant to prove but he could not be called on to answer further : for he was only to protect the interests of the Crown : *A. G. v. Lambwith*, p. 398. In this case the court refused to make an order for particulars against him as without precedent, and under the circumstances not necessary, but it was hinted that there might be cases in which some order of that kind might be made.

It may be noted that though no compulsory process issued against the A. G. yet where the A. G. failed to answer within a reasonable time an order might be obtained ex parte for him to answer within a week or in default that the bill should be taken pro confesso : Dan. Ch. Pr. pp. 421, 447 : *Groom v. A. G.* 9 Sim. 825 : *Peto v. A. G.* 1 Y. & J. 509 : 1 Fowl. Ex. Pr. 401, 452. But later the usual practice was for him to put in no answer at all : Dan. Ch. Pr. 128, 421.

It was never decided whether he might demur to a bill merely for discovery but probably he might : Dan. Ch. Pr. 124, 128 : and see *Deare v. A. G. post.* : (he might put in a formal answer, see *Davison v. A. G. ante.*) : though where the defendant to an information for accounts against him as army agent filed a cross bill against the A. G. and the Secretary for War, charging possession of documents which would show a settled account, and praying relief on that footing, their demurrer was overruled, for though he might not be entitled to the specific relief he claimed, the bill stated a case for equitable relief of some kind or other which would amount to a clear defence to the information : *Deare v. A. G.* 1 Y. & C. 197 ; though what the effect of an answer might be was another thing : *ibid.* p. 210 : see a somewhat similar case *A. G. v. Brooksbank*, cited *ante.*

It was suggested in Dan. Ch. Pr. p. 128 that if in cases of the above description interrogatories were administered to the A. G. he would put in a full answer. And the following passage from the judgment of the Lord Chief Baron in *Deare v. A. G.* seems to show that he would not resist a discovery (but not on oath, see *ante*, p. 71) if it was properly required. "I am not prepared to say that a bill of discovery has ever been filed or could upon principle be sustained against the Attorney General for a discovery of matters that can be neither in his personal nor official knowledge : or that the Crown would be bound through the medium of the Attorney General to make that discovery. At the same time it has been the practice which I hope never will be discontinued for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice where any real point of difficulty that required judicial decision has occurred." And, referring to a particular case *Crawford v. A. G.* 7 Pri. 1, where the Attorney General did set forth a full answer, he says : "There the Treasury desired that the question might be brought before the judicial consideration of some court of justice ; and it was very clear when once the court thought that it ought to have jurisdiction over the subject matter that it did not become the Attorney General to urge any form in opposition to it : otherwise I think it would be a difficult thing to say that a mere bill of discovery might be filed against the Attorney General instead of putting the party to his petition of right which is the proper remedy against the Crown where he claims a specific relief against the Crown."

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A foreign sovereign suing in this country brings with him

no privileges which exempt him from the common fare of other suitors: *King of Spain v. Hullett*, 7 Bli. N. S. 359, p. 393: 1 Cl. & F. 333, p. 353: and must therefore give discovery on his own oath, and not on the oath of an agent on his behalf: *ibid.*: and see *Prisleau v. U. S. A. L. R. 2 Eq.* pp. 663, 664.

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(f) *Corporate or other Bodies.*

See the different kinds of bodies mentioned in rule 5, *post*, p. 77.

In order that a party litigating with a corporate or other body may have the usual remedy or sanction which enables him to rely on discovery, namely, that the person who gives discovery gives it on oath and can therefore be indicted for perjury if he answers falsely, a remedy or sanction which would not exist if the discovery were merely given by the body under their common seal, provision is made (see *post* (4) as to interrogatories and *post* (5) as to discovery and production of documents) for obtaining discovery from officers or members of the body on its behalf: see Jessel, M. R. in *Wilson v. Church*, 9 Ch. D. pp. 555—556: *Wych v. Meal*, 3 P. W. 311: Redes. Pl. 188: *Prisleau v. U. S. A. L. R. 2 Eq.* p. 664.

The equity practice—

In equity the difficulty arising from the fact that a corporate body could not answer otherwise than under their common seal was got over by allowing a plaintiff to add as co-defendant with the corporate body an officer: *Wych v. Meal*: Redes. Pl. 188: *Moodalay v. Morton*, 1 B. C. C. 468: *McIntosh v. G. W. R. Co.*, 2 D. G. & Sm. 758: or a member: see *post*, p. 78: for the sole purpose of getting from him discovery on oath, whether of documents in the possession of the corporate body and entries therein: *Wych v. Meal*: Redes. Pl. 188: or of any act done by the body: Redes. Pl. 188: *Moodalay v. Morton*, 1 B. C. C. 468: or in fact of any matters which the corporate body as a litigant party would be bound to discover.

This practice which constituted an infringement of the rule (see *ante*, p. 40) according to which no person without an

interest, and therefore a mere witness, could be a party for the purpose of discovery originated with Lord Talbot in *Wyck v. Meal*, 3 P. W. 311 (but see an earlier case, *Anon.* 1 Vern. 117, cited *post*, p. 81): and Lord Eldon in *Fenton v. Hughes*, 7 Ves. p. 289 (and see *Dummer v. Corp. of Cheltenham*, *post*, p. 81) admitted the practice to be an established one, though he considered that the principle on which it was based was questionable, namely, that because a satisfactory answer could not be obtained from a corporate body therefore you made the secretary a party to get the discovery from him, and that as to the further reason, namely, that his answer might enable you to get better information it was very singular to make a person a defendant in order to enable yourself to deal better and with more success with those whom you had a right to put on the record.

The officer or member could be made a co-defendant with the corporate body not only to a bill for relief against the corporate body but also to a bill for discovery against them; for instance to a bill for discovery in aid of the defence to an action by the corporate body: *Glascott v. Copper Miners' Co.* 11 Sim. 305: *Imperial, &c. Association v. Whitham*, L. R. 3 Eq. 89.

The practice was described by Jessel, M. R. in *Wilson v. Church*, 9 Ch. D. pp. 555—556, as cumbrous and expensive, as involving in many cases the injustice of throwing the costs of the discovery upon the adversary though he might be right in the action, or of rendering it necessary for the person so made a party to take proceedings against the corporate body to recover his costs (see however *post*, p. 82, as to his costs of giving the discovery).

As to the equity practice in regard to discovery of documents under sects. 18 and 20 of the Chancery Procedure Act, see *post*, p. 85.

It was not confined to corporate bodies in the technical sense. For instance foreign republics were within the rule: see *Republic of Peru v. Weguelin*: *Republic of Costa Rica v. Erlanger*: *U. S. A. v. Wagner*: all cited *post*, pp. 81, 82.

- (1) *The Extent of the Discovery which can be required from the Corporate or other (see Rule 5, post, p. 77) Body.*

The discovery which can be required from a corporate or other body through its officers and members is that which it would be bound to give as a litigant party, that is to say, the knowledge information and belief of its agents (see as to the knowledge information and belief of agents in relation to discovery, *post*, p. 138 : and of past agents, *post*, p. 142 : and see *Moline v. Tasmanian Co. post*) : such as it could have been required to give in equity under its common seal.

Where a body answered under their common seal they were bound to take the means of acquiring all the knowledge of their officers agents or servants on the subject : see *McIntosh v. G. W. R. Co.* 4 D. G. & Sm. 544 (and see *Hall v. L. & N. W. R. Co.* cited *post*, p. 139), where this principle was carried to the length of allowing exceptions to an answer by the company and the secretary alleging their ignorance as to certain matters charged to have been transacted by their engineer, but not stating that they had inquired of him, though the engineer was himself a defendant and had put in a separate answer alleging that he had no remembrance on the subject : so also to examine all the documents in their possession before answering : *A. G. v. East Retford*, 2 M. & K. p. 40.

The following case also bears upon the obligation to give discovery relating to transactions antecedent to the appointment of the present officers of the company. In *Moline v. Tasmanian R. Co.* 32 L. T. 828, interrogatories were ordered to be answered by one of their directors or their secretary or such other officer as was most conversant with the transactions relating to the subject-matter of the action, the transactions being antecedent to the appointment of the present secretary and directors. The secretary having put in an answer which was considered futile and unsatisfactory, and a motion being made for a better answer and also for an order for examination (under section 46 of the C. L. P. Act, 1854, see *ante*, p. 39 n.) of certain persons who were practically the company as owning nearly all the shares and who were engaged in the transactions in question, in order to discover whether the secretary had access to certain information and therefore the power of giving the discovery sought by the interrogatories, the order was made, the hearing of the

motion for a better answer being postponed until after the examination.

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(2) *As to the Degree of Obligation of the Corporate or other*  
(see *Rule 5, post, p. 77*) *Body.*

The obligation of the body is not to give discovery by any officer or member that the adversary chooses to select: see *post, p. 82* (but see as to the equity practice, *post, p. 81*); but to put forward some officer or member who can give the discovery: see *post, p. 79*, as to interrogatories: and *post, p. 84*, as to discovery and production of documents.

It is not however a condition of the right of the body to sue that there is some person who can give discovery on its behalf: see Lord Cairns in *U. S. A. v. Wagner*, L. R. 2 Ch. pp. 594—595, part of which is cited *ante, p. 62*. A foreign republic might sue in its own name and was not bound to sue in the name of or otherwise name on the record some person upon whom the defendant could call for discovery on its behalf, (1) on the ground above stated, (2) on the ground that the proper course at all events was to move to stay proceedings until some proper person was named to give discovery (see *post, p. 79 n.*): *U. S. A. v. Wagner*, L. R. 2 Ch. 582, reversing Wickens, V. C. L. R. 3 Eq. 724, who had allowed the demurrer, considering that otherwise the plaintiff republic would obtain an advantage which no other suitor had, and distinguishing it from the case of an English corporation who could sue without producing its officers, for the defendant could make one of its officers party to a cross bill: *ibid.* pp. 731, 735, 736. But ordinarily the provisions of Ord. XXXI. r. 21 will be applied in the event of the corporate body failing to give proper discovery: see for instance, *Republic of Liberia v. Roye, post, p. 86*.

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(3) *As to how far it is Legitimate to use the Process of the Court against the Officer or Member appointed to give the Discovery.*

In equity where he was made a party this could of course have been done: see *post*, p. 81.

Under C. L. P. Act, 1854, s. 51, attachment could issue against the officer directed to answer, see App. Ch. II.: although (according to the usual practice, see *post*, p. 82) the order was made in his absence. It would be issued at the instance of the corporate body. In *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37: 36 L. J. Q. B. 15, an action brought by the liquidator (see as to the liquidator *post*, p. 294) in the name of the company, an order was made (against the opposition of the liquidator who swore that he had no power over the directors and could not answer himself) staying proceedings until the directors had complied with an order to answer interrogatories obtained against them by the defendant: the liquidator thereupon applied for and obtained an order for attachment against the directors, on the ground that he, being the person beneficially interested in the proceedings and the real plaintiff, was the person really injured by their refusal to answer. Unless the directors were specified in the order as the officers to answer under sect. 51 of the C. L. P. Act, they could not be attached for default in answering: the company were not bound to answer under that section but only the specified officer: *Button v. S. E. R. W. N.* 68, p. 20, where apparently by mistake an order had been obtained for the company to answer. See also *Lacharme v. Quartz Rock Co.* *post*, p. 86, where an order for inspection was made directly against an officer.

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(4) *Interrogatories.*

If any party to a cause or matter be a body corporate or a joint stock company whether incorporated or not or any other body (see *ante*, p. 74, as to foreign republics) of persons empowered by law to sue or be sued whether in its own name

or in the name of any officer or other person\* any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation company or body and an order may be made accordingly. Ord. XXXI. r. 5. A corporation sole is not within this rule: discovery could be had from him in chancery as from a private individual: Dan. Ch. Pr. 134.

This rule is adopted from sect. 51 of the C. L. P. Act (see *post*, App. Ch. II.), extending however the liability to be interrogated to a member† as well as an officer; and it seems that it is intended to be worked in the same way: see *Wilson v. Church*, 9 Ch. D. pp. 555—556: *Berkeley v. Standard Discount Co.* 13 Ch. D. pp. 99, 101: *Republic of Costa Rica v. Erlanger*, 1 Ch. D. p. 174.

It was sufficient under sect. 51 of the C. L. P. Act, 1854 if the officer was an officer at the time the order for answering was made: *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37: 36 L. J. Q. B. 15.

Directors were still officers for this purpose after a winding-up order though they had ceased to act: *ibid.* (see this case cited *ante*, p. 77): and see as to a late director after the company had ceased to carry on business: *Lacharme v. Quartz Rock, &c. Co.* cited *post*, p. 86.

See as to a secretary who had resigned since the filing of the bill: *Acomb v. Landed Estates Co.* 14 W. R. 387: 14 L. T. 57.

See as to a liquidator *post*, p. 294: and *Madrid Bank v. Bayley*, *ante*, p. 77.

An attorney on the record was not an officer within the

\* In equity the rule enabling an officer or member to be made a party (see *ante*, p. 73) did not apply where the body could be sued by their public officer for he could answer on oath: *Hendrie v. Thomson*, 1 Ir. Ch. R. 298. Under the C. L. P. Act a public officer suing under 7 Geo. 4, c. 46, could be interrogated as being a party: *McKewan v. Rolt*, 28 L. J. Ex. 380: 4 H. & N. 738: so a clerk of commissioners sued as such: *Mason v. Wythe*, 3 F. & F. 153.

† There is no hardship in making a member answer on behalf of the body: he is a partner and in reality a defendant (or plaintiff) though by reason of the rule as to corporate bodies he is not named on the record; see Jessel, M. R. in *Berkeley v. Standard Discount Co.* 13 Ch. D. p. 99. See as to a member being directed to answer, *post*, p. 80.

meaning of sect. 50 (inspection) of the C. L. P. Act: *Brown v. The Thames, &c. Co.* 43 L. J. C. P. 112.

On the application for leave to deliver interrogatories their propriety will not be considered: *Berkeley v. Standard Discount Co.* 9 Ch. D. 643: (though see *Heicetson v. The Whittington, &c. Co.* W. N. 75, p. 219): and in fact the purpose of the application is merely (but see *post*) to fix upon the person to answer if it is a case in which interrogatories can be delivered without leave under rule 1: *Singer Manufacturing Co. v. Long*, 22 S. J. 854, where on this ground it was held that a summons for this purpose might be taken out in long vacation: and see *post*.

*As to the Selection of the Person to Answer* (see also *ante*, p. 76).

The purpose of the application is in a case where leave to interrogate is not necessary under rule 1 to fix upon the person to answer: see *Singer Manufacturing Co. v. Long*, *ante*: and see the cases *post*. But an order may be made upon the body to answer without naming any particular person, for instance, "by the secretary (or clerk) or other proper officer:" see *Mayor of Swansea v. Quirk*, *post*, p. 83: and see the forms in Chitty, pp. 286—287: and Dan. Ch. F. 1704.\*

The judge in chambers will on the application for leave (but see *Singer Manufacturing Co. v. Long*, *ante*) to deliver the interrogatories direct who shall be required to answer the interrogatories: and it is open to the adversary to show why one member and not another can give the information or why one member can give information on one set of questions and another member on another set of questions: see Jessel, M. R. in *Wilson v. Church*, 9 Ch. D. p. 557: *Berkeley v. Standard Discount Co.* 9 Ch. D. 643: *Re Alexandra Palace Co.* 16 Ch. D. 58: and see *McIntosh v. G. W. R. Co.* 2 D. G. & Sm. 758, where not only the secretary but also the chief engineer

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\* It was stated by James, L. J. in *Republic of Costa Rica v. Erlanger*, p. 173, that the form of order prescribed by the rules of the Jud. Act was that given at common law and also in equity namely that the proceedings of a plaintiff corporate body should be stayed until they had named some proper person to give the discovery. But qu.

was made a co-defendant for the purpose of discovery of matters transacted by him on behalf of the company: see also *Moline v. Tasmanian R. Co.* cited *ante*, p. 75, and the form of order there used.

It might seem to be legitimate according to a recent case to deliver all the interrogatories to the different officers, each officer to answer the questions as to which he has any special knowledge, but the report is not clear, and it may be that the adversary was himself to indicate the particular interrogatories which he wished to be answered by particular officers: *Compagnie, &c. Pacifique v. Peruvian Guano Co.* 28 S. J. 410.

The person proposed by the adversary will not be called on to answer the interrogatories if the body show any reasonable objection to him: *Manchester Val de Travers Co. v. Slagg*, W. N. 82, p. 127, where the plaintiff company applied that a shareholder and former director of the defendant company, but who was also a large shareholder in the plaintiff company and personally interested in the success of the action, might be directed to answer on the defendant's behalf: the defendants objecting and offering to answer by their secretary, their objection was allowed by the Court of Appeal, *ibid.* Qu. whether the fact that the person selected by the adversary is his friend is an objection as suggested by Mellish, L. J. in *Republic of Costa Rica v. Erlanger*, 1 Ch. D. p. 173.

The body has as much interest as anybody else in seeing that the proper person should answer because the effect of the answer may be very serious as regards its position: see Jessel, M. R. in *Berkeley v. Standard Discount Co.* 13 Ch. D. p. 99: see as to reading the answer against the body, *post*, p. 83.

The secretary is as a rule the proper person to answer: see Jessel, M. R. in *Berkeley v. Standard Discount Co.* p. 99.

It was the practice of Jessel, M. R. not to direct a member to answer unless there was no officer in a position to do so, that is to say, who had a competent knowledge of the facts, and not to call upon any one to answer who had not the means of doing so: *Berkeley v. Standard Discount Co.* 13 Ch. D. p. 99: and see Blackburn, J. in *Republic of Costa Rica v. Erlanger*, p. 174.

But an officer is not necessarily an improper person because he has no personal knowledge of the matters. "Directors of a company in answering interrogatories must not only answer as to their individual knowledge but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts": Cotton, L. J. in *Southwark Water Co. v. Quick*, 3 Q. B. D. p. 321. The dictum in *Bechervaise v. G. W. R. Co.* L. R. 6 C. P. p. 38, to the effect that it was ridiculous to expect the secretary to know anything about an accident at which he was not present is not in accordance with equity practice: see also as to this case, *post*, p. 142. See *ante*, p. 75, as to the obligation of the corporate body to give its agents' information.

In equity (see the practice, *ante*, p. 73) the plaintiff might select any person (that is to say an officer or member of the body) he pleased (any person with respect to whom there was an averment that he or he and others had in their custody books and papers relating to the matters in the bill and whereby their truth would appear: *Glascott v. Copper Miners' Co.* 11 Sim. p. 313, where the governor, deputy chairman, one of the directors, and the secretary were made co-defendants with the company to a bill of discovery in aid of the defence to an action by the company: *Anon.* 1 Vern. 117, bill to discover writings where after insufficient answer by the corporation it was ordered that the clerk and such principal members as the plaintiff should think fit should answer on oath: see also *Dummer v. Corp. of Cheltenham*, 14 Ves. 245, suit against a corporation as trustees for a charitable purpose, the individual corporators being made co-defendants and personally charged with fraud, where Lord Eldon at pp. 253, 254, considered that under particular circumstances, for instance if an individual corporator had obtained possession of a deed and destroyed or cancelled it, the court would order that besides the clerk of the company such principal members as the plaintiff should think fit should answer on oath, and that the reason of making the clerk or officer a party was that generally he was the person who could give the information and accordingly overruled their demurrer), and make him co-defendant with the corporate body for the purpose of discovery, and if the person so made co-defendant was subject to the process of the court the plaintiff might use that process for the purpose of extracting whatever could be got from him: see James, L. J. in *Republic of Costa Rica v. Erlanger*, 1 Ch. D. pp. 172—173: and Wickens, V. C. in *Prisleau v. U. S. A.* L. R. 2 Eq. pp. 666, 667.

But it did not necessarily follow that he could visit upon the body the default in appearing or answering of the members or officers he had selected, for instance, that he could stay proceedings in the original suit of the body until appearance or answer of the member or officer made co-defendant with the body to a cross suit for discovery: *Republic of Costa Rica v. Erlanger*,

pp. 172—173, 175: *Prisleau v. U. S. A.* L. R. 2 Eq. 659: *Glascott v. Copper Miners' Co.* p. 314.

Nor was this because they might be persons over whom the body might have no control or authority so as to compel them to put in an answer, which was the ground on which Wickens, V. C. in *Prisleau v. U. S. A.* (and see the same judge in *U. S. A. v. Wagner*, L. R. 2 Eq. p. 731) refused to extend the time for taking evidence in the original suit by the U. S. A. until the president, who had been made co-defendant with the U. S. A. to a cross suit for discovery, had answered, but because the utmost extent (see *ante*, p. 76) of the obligation of the body was to give discovery by some proper officer or member, and not by the particular member or officer the opponent had chosen to select: *Republic of Costa Rica v. Erlanger*, pp. 172—175: if it were otherwise he might select some person who would decline to give the discovery and so he might get rid of the suit altogether: Mellish, L. J. *ibid.* p. 173: and see Blackburn, J. *ibid.* p. 175.

A proper order therefore both at common law and equity might be to stay the suit of the body until they had named some proper person or persons to give the discovery: *Republic of Costa Rica v. Erlanger*, pp. 173—175: *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140: *U. S. A. v. Wagner*, L. R. 2 Ch. p. 690: or even until a particular person had given the discovery if it appeared he was the right person: Blackburn, J. in *Republic of Costa Rica v. Erlanger*, p. 175.

#### *The Position of the Officer or Member called on to answer Interrogatories—his Costs.*

The officer or member is the representative or alter ego of the body for the purpose of answering the interrogatories: see Thesiger, L. J. in *Berkeley v. Standard Discount Co.* 13 Ch. D. p. 101.

The objection to be taken to the interrogatories under rule 5 is not an objection by the person actually interrogated but by the party for whom he is called on to answer: *ibid.*

In practice under the C. L. P. Act the corporate body was alone represented. The application for the administration of interrogatories was made in chambers against the corporate body and if they had any objection to the interrogatories the corporate body appeared by their solicitor, but the officer never appeared. He never had any claim to costs either before or after the interrogatories were answered by him. It was a matter entirely between the parties to the action, the corporation being one of those parties; and when the action was terminated and the costs taxed it was the corporation and they alone who had any claim to costs: *ibid.* Under section 51 of the C. L. P. Act the interrogatories were delivered to the body corporate or their attorney.

The practice should it would seem be the same now. The corporate body is served with the application. The solicitor of the body should act for the officer or member directed to answer and should prepare the answer for him and charge the body with the costs. These costs are part of the body's costs if they succeed. No formal provision will be made for his costs separate from the costs of the body: *ibid.* pp. 99, 100, 102, reversing Fry, J. 12 Ch. D. 295. See also the forms in Dan. Ch. Pr. 1704: Chitty, pp. 286—287.

It seems that in equity he should have put in a joint answer with the body unless there were some reason for putting in a separate answer: and where he put in a separate answer by a separate solicitor without any reason he was held not entitled to get his costs from the plaintiff: see *Booth v. Birmingham &c. Co.* 16 W. R. 538: see however *Law v. London, &c. Co.* 1 K. & J. p. 232, where the secretary's costs were ordered to be paid to him by the plaintiff and recovered by the plaintiff from the company.

The real position of the officer or member called upon to give discovery as the representative or alter ego of the body seems hardly to have been grasped by the judges in a case of *Mayor of Swansea v. Quirk*, 5 C. P. D. 106. There the defendant had obtained an order for the delivery of interrogatories to J. T. the town clerk or other the proper officer. The town clerk answered them and objected to give certain information which was required on the ground that it was derived from privileged communications made to him by the corporation as their solicitor. It was held that the corporation after putting forward this officer to answer for them could not avail themselves of his individuality as solicitor and refuse to answer on the ground of privilege: for by electing to answer through him they waived the privilege, pp. 107, 108. The ground of this decision is too narrow. The officer or member is called upon to give the information of the body. He is their mouthpiece: he has no individuality at all. It makes no difference whether the body elected to answer through him or not.

*As to Reading the Answer against the Body.*

In *Manchester, &c. Co. v. Slagg*, W. N. 82, p. 127, the Court of Appeal expressly refused to give an opinion as to



whether the answer of the officer or member could be read against the company.

The point seems never (unless perhaps in *Gibbons v. Waterloo Bridge Co.*) to have been actually decided in equity though the opinion was that it could not be read against the company: see *McIntosh v. G. W. R. Co.* 4 D. G. & Sm. p. 546: *Steward v. E. I. Co.* 2 Vern. 380: *Dummer v. Corp. Cheltenham*, 14 Ves. p. 247: *Wych v. Meal*, 3 P. W. 310: *Re Barned's Banking Co.* L. R. 2 Ch. p. 354: *Gibbons v. Waterloo Bridge Co.* 1 C. P. Coop. 385: 5 Pri. 491 p. 493, where it was held apparently on this ground that the clerk could not refuse to answer matter exposing the company to penalties: (see as to this last point, *post*, p. 343).

In *Wych v. Meal* Lord Talbot considered that though the answer could not be read against the company it might be of use to direct the plaintiff how to draw and pen his interrogatories towards obtaining a better discovery: and in *McIntosh v. G. W. R. Co.* 4 D. G. & Sm. p. 546, Knight-Bruce, V. C. observed that there might be a right to discovery from A. as to the acts of B. and yet no right to use it as evidence against B.

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#### (5) *Discovery and Production of Documents.*

Discovery of documents is obtained from a corporate or other (see rule 5, *ante*, p. 77) body by means of an order against the corporate body for an affidavit of documents in its possession to be made by the secretary clerk or other proper officer or officers on its behalf: see the forms in Seton, and see the cases *post*: an order for production of the documents disclosed in the affidavit can then (as at common law, or in the order for the affidavit in the Chancery Division: see *post*, p. 154) be made against the body.

It seems to have been considered by Lush, J. in *Cooke v. Oceanic Steam Co.* W. N. 75, p. 220, that no provision was made by the rules of the Jud. Act for ordering an affidavit of documents against a company and therefore it was necessary to fall back upon sect. 50 of the C. L. P. Act, 1854

("some officer to be named of such body corporate," see *post*, App. Ch. II.) as an authority for such an order. But this is not so. Under sect. 18 (see *post*, App. Ch. II.) of the Chancery Procedure Act it was held that an order of this nature could be made against a company, "on oath" not necessarily meaning the oath of the defendant himself (see *A. G. v. Dereham, &c. Co. contra*), but, in the case of a defendant who in the nature of things could not take an oath, the oath of some proper person (see also *ante*, pp. 62, 64), and that it was not against the letter and was within the spirit of the act to decide that the plaintiff was entitled to discovery of documents on oath and not merely under the corporate seal: *Ranger v. G. W. R. Co.* 4 D. G. & J. p. 76 (overruling *A. G. v. East Dereham, &c. Co.* 5 W. R. 486, and *Law v. London, &c. Co.* 10 Ha. App. 20). There is no reason for giving a different interpretation to the present rule. And in fact sect. 50 of the C. L. P. Act is now repealed, see *ante*, p. 6.

In *Ranger v. G. W. R. Co.* the order for the affidavit was qualified by a provision "unless the company should satisfy the court by sufficient evidence that it was unable to obtain": and so in *Republic of Liberia v. Roye*, L. R. 16 Eq. 179, referred to *post*, p. 86. But it is not usual to insert this qualification. And see *ante*, p. 76, as to the degree of obligation of the corporate body.

Where an order for an affidavit of documents had been made against the clerk of the Mercers' Company made co-defendant with the company for the purpose of discovery, it was held no excuse for non-compliance with the order that the wardens, the governing body, had the custody of the documents, and that he could not inspect them without their permission: at least he must say that he had applied for permission and been refused (see in this connection *Stuart v. Bute, Taylor v. Rundell*, and other cases discussed *post*, pp. 135—137); and so in the case of the secretary and directors of a company: *A. G. v. Mercers' Co.* 9 W. R. 83.

It was considered that the court had jurisdiction under sect. 6 of the C. L. P. Act, 1851 and section 50 of the C. L. P. Act, 1854, to make an order against the officer (a late director)

for inspection of the company's books, and such an order was made where an order for inspection made against the company could not be enforced, they having ceased to carry on business, and having no property against which sequestration could issue: *Lacharme v. Quartz Rock Co.* 31 L. J. Ex. 335.

See as to who are officers or members of a body so that they may be ordered to answer interrogatories, *ante*, p. 78.

See as to a liquidator *post*, p. 294: and *Madrid Bank v. Bayley*, *ante*, p. 77.

The affidavit of documents must if practicable be made by some person who has personal knowledge as to the documents in the possession of the corporate body. In *Republic of Liberia v. Roye*, 1 App. Cas. 139, the plaintiff republic had been ordered (L. R. 16 Eq. 179) to make an affidavit of documents by one or more of its officers or ministers. An affidavit was made by its consul general in England who was able to specify as to the documents in England, but, as to whether there were any documents abroad, could only state that according to the best of his knowledge information and belief there were no other documents. The affidavit was held insufficient; for (per Lord Cairns) his information was obviously merely such information as was sent to him, and he did not profess to have, and from the nature of the case could not have, any personal knowledge on the subject, that the plaintiffs had no business to put forward a person who was without any knowledge whatever on the subject, that he was not the proper officer, and that some person on the spot was the proper person, pp. 142—143. Lord Hatherley, at p. 146, considered that though where a defendant in person made an affidavit and swore there were such and such documents and no others that oath was all the opponent was entitled to; in the case of a person not having himself charge of the documents as officer of a corporate body he must state his sources of knowledge and means of information, that it was not enough for him to say "to the best of my belief these are all the documents that can be had" when it might be no part of his duty to know anything whatever on the subject, and that without such an explanation the court had not that which it

required and which it had a right to have, namely, the sanction of the oath of the proper officer that those were all the documents. The decree of the court below dismissing the action for non-compliance with the order was affirmed: see *post*, Bk. III. Ch. VII. Sect. III.

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(g) *Sheriffs.*

In any action against or by a sheriff in respect of any matters connected with the execution of his office, the court or a judge may on the application of either party order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned: Ord. XXXI. r. 28.

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(h) *Miscellaneous.*

*Person treated as Party to Action by Consent.*

Where an order was made in an administration suit to carry into effect a contract and the purchaser appeared and consented to be bound by it, the defendants (trustees) were held bound at his instance to make an affidavit of documents as to the matters in question between them and him in a summons which he had taken out, for they obtained the order by which he consented to be treated as a party: *Dent v. Dent*, L. R. 1 Eq. 187.

*Order on all the Plaintiffs for Affidavit of Documents.*

Where an order for an affidavit of documents is made on plaintiffs the common order is not that the plaintiff or plaintiffs but that the plaintiffs shall make an affidavit as to documents in their or his possession or power: see Cotton, L. J. in *Wilson v. Raffalovitch*, 7 Q. B. D. p. 561: and the forms in Seton: and the affidavit must be made by all the persons required to join in it unless special reason to the contrary is shown: *Walker v. Kennedy*, 5 W. R. 396.

But if it is shown satisfactorily that one of the plaintiffs is not in a condition to make it the court would not grant an attachment against him nor dismiss the action: see Cotton,

L. J. *ibid.* See also *Hartley v. Owen*, 34 L. T. 752, where an order for production of documents was made on the plaintiffs, husband and wife (see as to married woman, *ante*, p. 67), and, the husband having absconded, the wife made an affidavit of documents in her possession and deposed that to the best of her belief there were no other documents relating to the suit, and a motion to dismiss the action under Ord. XXXI. r. 21, was under the circumstances refused, for the rule was not imperative (Bk. III. Ch. VII. Sect. III.) and probably every document relating to the suit could be produced.

*As to Persons suing in other Persons' Names.*

Where persons sue in other persons' names though they may be the real plaintiffs yet these other persons are the plaintiffs on the record, and therefore in point of law the plaintiffs, and must be taken to be the parties conducting the litigation, and they must conduct it according to the rules of English jurisprudence and obey the orders of the English court in which the action is brought, for instance, orders for discovery or production of documents: *Wilson v. Raffalovitch*, 7 Q. B. D. 553, pp. 557, 558.

Where therefore underwriters brought an action to recover the value of goods in the names of the shippers whom they had paid for a total loss, and by consent an order was made upon the plaintiffs for an affidavit of documents in their possession, and subsequently, an affidavit by one only of the plaintiffs being put in, an order was made for a further affidavit by them, the Court of Appeal, reversing the court below who had ordered that the plaintiffs be absolved from any further discovery of documents, held that this order for a further affidavit must stand, for the first order, which could not, being by consent, or at all events was not appealed against had not been complied with: and it was no answer to show the difficulty or even the impossibility of procuring an affidavit from the other plaintiff, or the improbability of there being any other documents: that was their misfortune: *ibid.* pp. 527—561. But if it were shown satisfactorily that the

other plaintiff was not in a condition to make an affidavit, the court would not attach him or dismiss the action : Cotton, L. J. *ibid.* p. 561 : see also *Hartley v. Owen*, *ante*, p. 88. The question therefore after all was one of mere form.

Qu. Whether in a case of that kind defendants are entitled *ex debito justitiæ* to an order in that form on the nominal plaintiffs : see *Wilson v. Raffalovitch*, pp. 557, 560.

It may be noted that it is legitimate to interrogate the plaintiff (or defendant as the case may be) whether he is not merely the nominal plaintiff, and A. B. the real plaintiff : in order to let in the declarations and admissions of the real party interested : see *Sketchley v. Connolly*, *post*, p. 113 : and *Levy v. Pope*, *post*, p. 439.

Where a liquidator carried on an action in another person's name it was held that not being a party he could not be interrogated : he had been ordered to make an affidavit of documents, but the order was intituled also in the matter of the company and the Companies Act, 1862 : *Massey v. Allen*, W. N. 78, p. 246 : and see further as to a liquidator, *post*, p. 294.

## CHAPTER IV.

## INTERROGATORIES.

THE rules of Ord. XXXI. dealing specially with interrogatories are those numbered 1 to 11 (see *post*, App. Ch. II. where these rules are set out with references to the sections and pages where they are considered). These rules only regulate the way in which interrogatories which might have been administered before the Jud. Act are now to be administered, that is to say, the period within which, the mode in which, and the time at which they are to be administered. They give no right to interrogate which was never before exercised (whether by bill of discovery or otherwise: see Jessel, M. R. p. 489) in any of the courts of law or equity: Brett, L. J. in *Lyell v. Kennedy*, 20 Ch. D. p. 491: (or in the courts of equity alone according to Jessel, M. R. for at pp. 488, 489 he considers, referring to *Horton v. Bott*, that if the right did not exist in equity before the C. L. P. Act, 1854, there was no right to administer interrogatories under that act, but see as to this, *ante*, p. 8): and see *ante*, Introd. Chap. Section 4 (B) generally as to the Jud. Act in relation to discovery, and in particular *ante*, pp. 7—8, in reference to the conflicting practice of discovery in equity and at common law, and the extent to which the equity practice is to prevail.

I. *As to the necessity of applying for Leave to Interrogate, the condition under which Leave is granted, and the effect of granting it.*

In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time after delivering his statement of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, and in every other cause or matter the plaintiff or defendant may by leave



of the court or a judge, deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party\* without an order for that purpose: provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness: Ord. XXXI. r. 1.

[The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: old Rule 1 of Ord. XXXI.]

In deciding upon any application for leave to exhibit interrogatories, the court or judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars (a), or to make admissions (b), or to produce documents (c), relating to the matter in question, or any of them: Ord. XXXI. r. 2.

(a) See *O'Meara v. Stone*, *post*, p. 93: and generally as to obtaining particulars by interrogatories, *post*, p. 451.

(b) See *Hellier v. Ellis*, *post*, p. 93.

(c) See *post*, p. 123.

The object of requiring the leave of the court to administer interrogatories in actions other than those founded on fraud or breach of trust is to prevent the power of discovery being used where it is not really wanted. Under the original rules of the Jud. Act litigants in every court comprised in the High Court of Justice enjoyed far wider powers of discovery than in the old common law courts: a more perfect but most expensive machinery was placed in their hands: the result was that voluminous and unnecessary interrogatories were

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\* See a case, *Swire v. Redman*, *post*, p. 96.

freely administered entailing great and useless expenditure, the burthen to poor litigants being very heavy. In order to check this abuse, and in order to protect the litigants against themselves, even though it should be said that they consented to interrogatories of this kind, the New Rules required that the leave of the court should be obtained: see *Aste v. Stunmore*, 13 Q. B. D. 326, pp. 329—330: see also the judgments in *Whyte v. Ahrens*, ante, p. 36.

. See as to the old chancery practice, *post*, sect. 2 (b): as to the old common law practice, *post*, sect. 2 (c), and in particular as to the form of affidavit there in use, *post*, p. 97.

The leave given is not to administer specific interrogatories (as was the old common law practice, see *post*, p. 99), but to interrogate generally. It is sufficient therefore if the applicant state the nature of the action, the issues involved and the general scope and object of the proposed interrogatories; if upon that statement it appears that they would be irrelevant, or that the matters intended to be inquired after are scandalous or come under any of the objections enumerated in rules 6 and 7 the judge will exercise his discretion by refusing to allow any interrogatories to be administered in order to avoid expense. It is not therefore necessary before the hearing of the application to serve the other party with a copy of the proposed interrogatories. All that the judge has to do is to see that it is a fit case for interrogating, that the general character of the proposed interrogatories is not improper, and that it is not sought to administer them for the mere purpose of annoyance and worry: where these conditions are satisfied, if the interrogatories can possibly be in any degree relevant, the order will be made: the party will not be tied down to any specific interrogatories although he must interrogate only as to the particular points he has put forward, and if he interrogates as to other matters it will be at the peril of having his interrogatories struck out (but see *McIlroy v. Duncan*, *post*, p. 107, as to striking out irrelevant interrogatories): *Hall v. Liardet*, W. N. 83, pp. 164, 176, 194: and see *Clarke v. Bennett*, *post*, p. 107.

This practice leaves it open to the judge on any subsequent

application under rule 7 to strike out (not set them aside altogether, see *McIlroy v. Duncan*, *post*, p. 102) any particular interrogatories, or under rule 6 to relieve the party from answering them : see *Hall v. Liardet*, W. N. 84, p. 165 : *Clarke v. Bennett*, cited *post*, p. 107.

In *McIlroy v. Duncan*, W. N. 84, p. 48 (see this case further cited *post*, p. 102), an action to recover patents, stock, &c. sold under an agreement, and for damages for mis-representation, the defendant was allowed to deliver interrogatories confined to the cause of action disclosed in the statement of claim and particulars.

In an action to recover a sum due on an I O U the defence being that the sum (except a small balance) had been paid before action brought, the plaintiff had taken out a summons for directions and obtained leave to interrogate, with liberty to either party to apply for further directions without taking out a fresh summons. The defendant having served on the plaintiff a notice to admit the fact of payment of which the plaintiff took no notice, was given leave to interrogate the plaintiff whether he was not paid on a certain day as alleged in the defence : *Hellier v. Ellis*, W. N. 84, p. 9.

In an action for damages for injuries through being thrown off a car belonging to the defendants, the defence being that it was an accident, the plaintiff was allowed to interrogate them as to the circumstances under which the accident occurred and as to any verbal reports made to them by their servants : *Jones v. London Road Car Co.* W. N. 83, p. 196.

In an action for personal injuries sustained through being struck on the head by a crane the plaintiff was allowed to interrogate (without making deposit, Bk. III. Ch. VIII. Sect. II.), on an affidavit stating that the defendant disclaimed responsibility on the ground that the men working the crane were not in his employment : *Burr v. Hubbard*, W. N. 83, p. 198.

In *Smith v. Went*, W. N. 84, p. 81 : 32 W. R. 512 : 50 L. T. 382 : an action by beneficiaries for administration and for setting aside an assignment by the executor, the plaintiffs were allowed to deliver to all the defendants interrogatories extending to twenty-eight folios (omitting, however, two of the proposed interrogatories as unnecessary), and (Bk. III. Ch. VIII. Sect. II.) without making any deposit, which in this case would have amounted to 60%.

See also *Hounston v. Sligo*, *ante*, p. 27.

Where the information sought could be obtained by particulars, leave to interrogate was refused : *O'Meara v. Stone*, W. N. 84, p. 72, action for damages by negligent driving, the defendant desiring to interrogate as to the alleged negligence and the damages. See generally as to obtaining particulars by means of interrogatories, *post*, p. 451.

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## II. *As to the Stage of the Action at which it is legitimate to deliver Interrogatories.*

See as to the general principles by which the court will be guided in enforcing or withholding discovery on grounds

connected with the character of the action or of the pleadings, or with the stage of the action at which it is sought, *ante*, p. 13.

See also *post*, p. 158, as to discovery and production of documents.

Under the present rule (see *ante*, p. 91) interrogatories cannot be delivered without leave at any stage of the action, except in actions where relief by way of damages or otherwise is sought on the grounds of fraud or breach of trust. See as to the cases in which leave has been granted, the conditions under which it is granted, and the effect of granting it, *ante*, Section I.

See as to discovery before giving particulars, *post*, p. 99, referring to the old common law practice in the case of interrogatories: and *post*, p. 161, as to discovery and production of documents.

Leave to interrogate was given after the pleadings had closed to a defendant setting up a counterclaim: *Jones v. Jones*, W. N. 84, p. 17.

It may be legitimate in some cases for a plaintiff to serve a notice to admit facts before defence: see *Crawford v. Chorley*, W. N. 83, p. 198.

(a) *The Practice under the old Rules.*

Under rule 1 of the old rules (see *ante*, p. 91) the plaintiff might in every action at the time of delivering his claim, and a defendant might at the time of delivering his defence or at any subsequent time not later than the close of the pleadings, deliver interrogatories without any order for that purpose: but at any other stage not without leave.

The plaintiff after statement of claim up to the close of the pleadings.

It was not intended by the old rule 1 to make the delivery of interrogatories a mere matter of course so that in every case they might be delivered by the plaintiff whether necessary for the purposes of the suit or not. The original rule 5 (see *post*, p. 100) gave the judge the widest possible discretion (that is judicial discretion) as to striking them out. The court could not in the face of the orders say that as an invariable rule interrogatories might not be delivered before the statement of defence: but if the plaintiff did so deliver them he put upon the defendant the onus (and see Cotton, L. J. in *Eade v. Jacobs*, 3 Ex. D. p. 337) of applying to have them struck out: the

judge should then require of the plaintiff some reason for wanting the answers, and, if the plaintiff could not say what he wanted them for, the judge might well hold that the interrogatories were not *bonâ fide* but for the purpose of vexation or increasing costs; and he could order them to be struck out without violating the rules or legislating to get rid of the provisions of the rules but by properly exercising the powers given to him by rule 5. See James, L. J. in *Mercier v. Cotton*, 1 Q. B. D. pp. 443—444: and see Mellish, L. J. *ibid.* p. 445.

It was not the practice in the Chancery Division to delay discovery by not allowing the plaintiff on delivery of his statement of claim to deliver interrogatories till the statement of defence had been delivered: in an ordinary action in the Chancery Division the interrogatories justified themselves: Jessel, M. R. in *Harbord v. Monk*, 9 Ch. D. p. 617, regarding *Mercier v. Cotton* as limited to actions in the nature of common law actions: or, according to Mellish, L. J. in *Mercier v. Cotton*, p. 445, the cases are more frequent where they will be allowed, for the plaintiff may want an answer in order to know how to amend his claim and frame his case.

A statement that a demurrer was intended to be put in, there being no cause of action, would have been a sufficient reason for not allowing the interrogatories: Mellish, L. J. *ibid.* So Wickens, V. C. in *Carver v. Pinto Leite*, L. R. 7 Ch. 92, n. considered that no order would be made against a defendant for production before answer if he intended to plead, or on an allegation, supported by such evidence as the circumstances rendered necessary, that his answer when filed would displace the plaintiff's right to production in whole or in part.

In a common law action if a plaintiff exhibited them with his statement of claim he must have justified them under this rule: *Harbord v. Monk*, 9 Ch. D. 616. In the majority of common law actions it is not possible to tell whether interrogatories are material until defence delivered. It would be useless to have interrogatories upon matters which would very probably be admitted as for instance in an action for libel: *Mercier v. Cotton*, pp. 444—445: and see observations to the same effect of Lindley, L. J. in *A. G. v. Gaskill*, 20 Ch. D. p. 530. The practice in the common law division was to strike them out as a matter of course unless good reasons were shown (fraud for instance: *Strong v. Tappin*) when delivered with the claim: see *Strong v. Tappin*, W. N. 76, p. 22: and W. N. 76, pp. 54, 55, 56: nor was this practice disapproved of by the Court of Appeal (see *ante*) in *Mercier v. Cotton*, 1 Q. B. D. pp. 443—445.

They were held legitimate in the following cases: *Beal v. Pilling*, 38 L. T. 486, an action to recover expenses alleged to have been authorized by the defendant through his solicitors, where, the defendant having denied their authority, the plaintiff joined them as defendants and before their defence interrogated them as to their authority, and the court refused to strike them out under the special circumstances of the case: *Acheson v. Henry*, I. R. 5 C. L. 496, an action for trespass on a fishery where the plaintiff was allowed to interrogate before defence as to whether the defendant or any person authorized by him had fished, on the ground that it would enable him to see whether he should go on with the action.

A defendant was justified in delivering interrogatories on putting in his defence.

Plaintiff and defendant applying for leave beyond the limits of time within which interrogatories could be delivered without leave.

(1) After the close of the pleadings (this restriction is not in the present rule, see *ante*, p. 91).

The provision appears to have been mainly though not exclusively inserted to meet the case of a party wishing to interrogate after the close of the pleadings: see Jessel, M. R. in *Disney v. Longbourne*, 2 Ch. D. p. 705.

However convenient it might be to defer interrogating until after issue joined, that was not the intention of the legislature: only therefore under special circumstances would leave be given after the pleadings had closed: *London, &c. Insurance Co. v. Davies*, 5 Ch. D. 775, where the defendant was allowed to administer interrogatories, but the hearing of the action not to be postponed in the event of the plaintiff insufficiently answering.

Some reason or explanation must have been given though an affidavit was not necessary: *Ellis v. Ambler*, 36 L. T. 410, where the plaintiff, after himself joining issue, was refused leave, no explanation of the delay being given. It was matter for the discretion of the judge with which the Court of Appeal would not interfere: *ibid.*

In *Swire v. Redman*, 20 S. J. 584, the plaintiff having already administered interrogatories which, from want of sufficient description or identification of certain articles therein mentioned, the defendant was unable fully to answer, and having subsequently obtained by inspection of the defendant's documents further information in this respect, applied after the close of the pleadings to administer interrogatories of the same kind with a proper description of these articles, and the Court of Appeal, though dismissing the application on the ground that the interrogatories were too long, did so without prejudice to an application for leave to administer a simple interrogatory for that purpose.

Where the plaintiff's allegations had been denied by the defendants in their defence the plaintiff was allowed, after issue joined, to interrogate thereto: *McCorquodale v. Bell*, W. N. 76, p. 39.

In a case in equity, a defendant having filed a concise statement and interrogatories for the plaintiff's examination after the latter had given notice of motion for decree and had filed his affidavits, proceedings were stayed until the plaintiff should put in his answer, the delay not having been excessive: *Bramber v. Carne*, L. R. 2 Eq. 610: and see *post*, p. 97, as to the old chancery practice.

It may be observed that until the close of the pleadings it is not necessarily known what matters will be in question. For instance where a defence equivalent to an affirmative plea is put in, the matter in the claim is admitted for the purpose of that particular defence, and therefore there is no matter in question (but see *post*, p. 183) until the defence is replied to and the matter therein put in issue. Suppose such a defence of a release, how can the plaintiff be entitled to discovery until he puts the release in issue? See this point also referred *ante*, p. 35, and *post*, pp. 464, 500.

## (2) Before claim and defence respectively.

As regards applications by plaintiffs and defendants for leave to interrogate before putting in their statements respectively of claim or defence Jessel, M. R. in *Disney v. Longbourne*, 2 Ch. D. p. 705, professed himself at a loss to imagine the case in which such applications would be granted although the rule included such cases: and accordingly he refused an application of this nature by the defendants (executors) put forward on the ground that they were ignorant of the subject-matter of the claim (breaches of trust by their testator) and could not prepare their defence without information from the plaintiff. He considered that in a case of this kind a defence should be put in ignoring all the statements in the plaintiff's statement of claim and claiming the benefit of every defence open to the defendant, and interrogatories delivered with the defence which in case of necessity could be subsequently amended.

A defendant has been allowed to have discovery before putting in his defence for the purpose of seeing whether he should not make it an undefended action. In *Hawley v. Roade*, W. N. 76, p. 64, a common law action



on a bill of exchange since the Jud. Act, the defendant was allowed to interrogate as to the consideration on this ground. And see *Anon.* 20 S. J. 81, referred to *post*, p. 161.

In common law actions to recover money the defendant would be allowed according to the old common law practice to get particulars of the sums claimed from the plaintiff before defence, and, if he wished it, by the machinery of interrogatories (see as to this *post*, p. 452, and *ante*, p. 91); but otherwise in a chancery action for an account, for such particulars are not necessary for the defendant to frame his defence: *Augustinus v. Nerincke*, 16 Ch. D. 13, p. 18.

A plaintiff will rarely be allowed to interrogate before claim on general principles, see *ante*, p. 13: and see *post*, p. 160, as to discovery of documents at this stage. Leave has occasionally been given. In a case in the Admiralty Court, *The Murillo*, 28 L. T. 374, cited *ante*, p. 20, a plaintiff was allowed to interrogate before petition filed.

### (b) *The old Chancery Practice.*

In chancery the suit was commenced by a bill: no interrogatories therefore could be delivered before bill, before that is to say the plaintiff had stated his case. Further until the Chancery Procedure Act, 15 & 16 Vict. c. 86, interrogatories were a part of a bill: and were therefore, so far as the plaintiff was concerned, *ex necessitate rei* filed before the defence in the shape of the answer was put in. By this act, section 10, it was directed that the interrogatories should no longer form part of the bill: by section 12 the plaintiff was authorized to file and deliver them within a limited time (by Ord. XI. rr. 3 and 5 in effect within eight days after defendant's appearance) without leave, beyond that period only by special leave: but here again *ex necessitate rei* before the defence was put in, the answer by section 14 being still combined with the defence.

By section 19 of the act the defendant was (at his option instead of the old procedure of a cross bill for discovery) allowed, but not before putting in a sufficient answer where he was required to answer, to file interrogatories to which should be prefixed a concise statement of the subjects on which a discovery was sought: and though, as an answer was deemed sufficient until excepted to, it might be that the interrogatories would be allowed to be filed on putting in an answer, no answer would be enforced from the plaintiff until a limited time after a defendant sufficiently answered the exceptions, just as in the case of an answer to a cross bill for discovery.

### (c) *The Common Law Practice under the C. L. P. Act, 1854.*

At common law the practice of administering interrogatories was introduced by the C. L. P. Act, 1854, sections 51 and 52 (see App. Ch. II.). Both plaintiff and defendant could interrogate, but in no case (as interpreted in practice see Day, C. L. P. p. 304, though the intention of section 51 would seem to have been otherwise, see App. Ch. II.) without the leave of the court or a judge, and supported by an affidavit of merits: see section 52 *post*, App. Ch. II.: Day, C. L. P. p. 309: *May v. Hawkins*, 11 Exch. 210 (where the plaintiff failed to show a good cause of action on the merits): and see the cases *post*, p. 98. The affidavit must have been made by the party and his attorney or agent: but where the party from unavoidable circumstances could not join in the affidavit the section (52) provided that it might be dispensed with (but that the party was old and in England was not deemed



sufficient in an Irish case, *Adair v. Simpson*, L. R. Ir. 1 C. L. 578). Where the party sued in person the attorney's concurrence would be dispensed with: *Oxlade v. N. E. R. Co.* 12 C. B. N. S. 350.

Under this act the judges (in pursuance of the discretion both as to extent and time which they considered to be reposed in them to avoid the more rigid practice in chancery: see *Bechervaise v. G. W. R. Co.* L. R. 6 C. P. p. 37 and *post*, p. 111) only under special circumstances disclosed in a special affidavit (see Day, C. L. P. p. 304, citing *Martin v. Hemming*: *Jones v. Pratt*: and *Bechervaise v. G. W. R. Co.*) allowed a party to interrogate before he had put in his declaration or plea (or, in the case of a general plea and an order for particulars, before complying or attempting to comply with the order, for his defence was not disclosed by the general plea: see *Gourley v. Plimsoll*, pp. 374—375 and *post*) as the case might be, partly on the ground that it was a fundamental rule that a party was not entitled to interrogate for the mere purpose of enabling him to see whether he had a case, but to enable him to support the case which he had put forward in his declaration or plea or to see if it could be supported: *Gourley v. Plimsoll*, pp. 374, 373: and see *Atter v. Willison*: *Morris v. Parr*, pp. 206—207: and partly on the ground that (and especially before declaration, in which case the plaintiff must show the nature of his case and clearly satisfy the court that the interrogatories were pertinent: see *Croomes v. Morrison*, p. 985: Day, C. L. P. p. 304: *Morris v. Parr*) it could not be seen whether the interrogatories were really relevant: *Gourley v. Plimsoll*, L. R. 8 C. P. 362: *Bechervaise v. G. W. R. Co.* L. R. 6 C. P. 36: *Morris v. Parr*, 6 B. & S. 203: *Croomes v. Morrison*, 5 E. & B. 984: *Atter v. Willison*, 7 W. R. 265: *Martin v. Hemming*, 10 Exch. 478: *Jones v. Platt*, 6 H. & N. 697: 30 L. J. Ex. 365: *James v. Barnes*, 17 C. B. 596: 25 L. J. C. P. 182.

After plea (or perhaps even after issue joined when their relevancy could be better tested: see *Gourley v. Plimsoll*, p. 372: *Morris v. Parr*, pp. 206—207: Day, C. L. P. p. 304) seems to have been the usual stage at which both plaintiff and defendant administered interrogatories: see

*Bechervaise v. G. W. R. Co.* pp. 37—38 : *James v. Barns* : though the rule (see *post*, App. Ch. II.) pointed to the time of declaration for the plaintiff and of plea for the defendant : *Martin v. Hemming*, p. 487.

Leave would not be granted for the purpose of complying with an order or an obligation to give particulars : *Gourley v. Plimsoll* (defendant in action for libel pleading justification, see other similar cases of discovery by a defendant in support of defence of justification *post*, pp. 349, 463) : *Jones v. Platt* (plaintiff in patent action bound to deliver particulars with his declaration, for he could amend them afterwards, see as to patent actions *post*, Bk. III. Chap. I.) : but otherwise where it was sought for the purpose of complying with an order for further and better particulars : see *Bramwell, L. J. Phillips v. Phillips*, 4 Q. B. D. p. 131 : and *Gourley v. Plimsoll*. See as to discovery and production of documents before or for the purpose of giving particulars *post*, p. 161.

The leave was to administer particular and approved interrogatories (but the court would only lay down the principle on which they were to be allowed and not settle the form of them or what particular ones should be allowed ; that must be done in chambers : *Zarifi v. Thornton*, 26 L. J. Ex. 214 : *Alexandra Dock Co. v. Elliott*, 23 L. T. p. 848) : Day, C. L. P. 308. This practice of settling them in chambers does not seem to have worked well : the hurry of chambers never allowed of sufficient time being given for the judge to understand the bearing of particular questions : and the applicant had sometimes to parade before his opponent the hoped-for results of questions : see Day, C. L. P. 308 preferring (as in fact is the present practice, see *ante*, p. 92) that when the judge was satisfied that the delivery of some interrogatories was proper the party should be left to put such questions as he might think fit and the objections taken in answering them. In chambers the judge would ask questions and listen to the statements and counter-statements of the parties : see *Croomes v. Morrison*, p. 985 : *Alexandra Dock Co. v. Elliott*, p. 848.

### III. *As to setting aside and striking out Interrogatories.*

Ord. XXXI. r. 7.—Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously or struck out on the ground that they are prolix oppressive unnecessary or scandalous: and any application for this purpose may be made within 7 days after service of the interrogatories.

Ord. XXXI. r. 6.—Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant or not bonâ fide for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[The old rule 5a. Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant or not bonâ fide for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer. An application to set aside these interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within 4 days after service of the interrogatories.

The original rules 5 and 8. Any party called upon to answer interrogatories whether by himself or by any member or officer may within four days after service of the interrogatories apply at chambers to strike out any interrogatory on the ground that it is scandalous or irrelevant or is not put bonâ fide for the purpose of the action, or that the matter inquired after is not sufficiently material at that stage of the action or on any other (that is to say grounds ejusdem generis, not that a judge might strike out an interrogatory whenever he thought fit: *Jessel, M. R. Fisher v. Owen*, p. 652) ground. And the judge if satisfied that any interrogatory is objectionable may order it to be struck out. Any objection to answering any interrogatory may be taken and the ground thereof stated in the affidavit.]

As originally drawn Ord. XXXI. contained the above two rules numbered 5 and 8: but the conflict of opinion among masters and judges as to their practical working was so great that in spite of, or perhaps rather to carry out more clearly, the interpretation put upon them by the Court of Appeal in two cases of *Fisher v. Owen*, 8 Ch. D. 645 and *Allhusen v. Labouchere*, 3 Q. B. D. 657 they were repealed, and the above rule 5a substituted for them.

The present rule 7 as well as the old rule 5a enables an application to be made either to set aside the interrogatories altogether or to strike out particular ones. This distinction was not in terms pointed out in the original rule 5: but after the interpretation put upon it by the Court of Appeal in the two cases above referred to and cited *post*, it may be said to have been incorporated therein.

The onus is on the party objecting to the interrogatories to show what particular ones offend or that the whole of them offend against the provisions of the rules: *Allhusen v. Labouchere*, 3 Q. B. D. p. 665.

A party (under the original rules, *ante*) taking out a summons to strike out interrogatories ought to state in his summons whether he moves to set them aside altogether, or to strike out particular ones in which case he must specify the objectionable ones, or he may do both: if not, the judge may allow him to point out the objectionable ones on the hearing of the summons or he has a right to dismiss the summons or send it to be amended, or send back the parties in order that the person objecting might object to particular interrogatories, or he may take out a fresh summons for the purpose: *ibid.* pp. 660, 661, 663, 664, 665: and see the passages from the judgments cited *post*, p. 103.

The Court of Appeal (and see as to the Divisional Court *Grumbrecht v. Parry*, cited *post*, p. 108) will not (as a rule) go through a number of interrogatories to say which can and which cannot be put: that is the work of chambers: *ibid.* pp. 661, 666: and see Bk. III. Ch. IX. Sect. II.: but see *Grumbrecht v. Parry* in the Court of Appeal, *post*, p. 108.

It will review the decision of the judge in allowing or disallowing any particular interrogatories if he is wrong: *ibid.* p. 663: and see *Fisher v. Owen*, 8 Ch. D. p. 652.

Generally it will not interfere with the discretion of the judge if it has been exercised on a right principle. And this was so under the C. L. P. Act, 1854: see Day, C. L. P. pp. 303, 308, citing *Villeboisnet v. Tobin*, L. R. 4 C. P. 184, and other cases of that class (criminatorious); and see *Morris v. Bethell*, L. R. 4 C. P. 768: and *ante*, p. 99, and *post*, p. 319.

The application must be made within seven days: see rule 7, *ante*.

(a) *As to setting aside Interrogatories.*

Interrogatories will only be set aside where they should not have been delivered at all; where therefore leave has been obtained to interrogate, they cannot be set aside, and

the only application that can be made is to strike out particular interrogatories on the grounds specified in the rule (see *post* (b)) : *McIlroy v. Duncan*, W. N. 84, p. 48.

The necessity under the present rule 1, see *ante*, p. 90, of applying for leave to deliver interrogatories in all actions except those where relief is sought on the ground of fraud or breach of trust renders this provision for setting them aside of less importance than under the old rules, and more especially so in view of the enlarged power of the judge to strike out particular interrogatories, see *post* (b).

They may be set aside if they have been exhibited unreasonably or vexatiously : see the rule *ante*, p. 100.

In *Gay v. Labouchere*, 4 Q. B. D. p. 207, Pollock, B. considered these words "exhibited unreasonably or vexatiously" to refer rather to the stage of the action at which the interrogatories were exhibited than to impropriety or irrelevance. This construction is certainly too narrow, although it is on this interpretation of the words that in common law actions interrogatories delivered with the statement of claim used to be set aside : see *Mercier v. Cotton*, *ante*, p. 95. It is impossible to restrict the meaning of the words in this way. They are vague and in all probability intentionally vague in order to confer a very wide discretion upon the judge. The extracts given *post* from the judgments of members of the Court of Appeal in the two cases of *Fisher v. Owen* and *Allhusen v. Labouchere* lay down as definitely as is possible the principles on which the courts should exercise their discretionary powers in this respect.

In *Fisher v. Owen*,\* p. 652, Jessel, M. R. says "I am far from saying that where the great majority of interrogatories are open to objection the judge is not at liberty to order them all to be struck out leaving the plaintiff to put in new ones free from objection. I think that in such a case he is not bound to go through them and to see what small portions of them ought to remain but may properly exercise his

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\* Both this case and *Allhusen v. Labouchere* were decided under the original rules, see *ante*.

discretion by striking them all out giving the plaintiff liberty to set the matter right. But that should only be done where the bulk of the interrogatories is objectionable or where the objectionable interrogatories are so intermingled with the others that it is difficult to separate them." In the other case, *Allhusen v. Labouchere*, 3 Q. B. D. p. 658, James, L. J. said: "A judge is under the existing system not called upon to refuse or allow interrogatories en bloc, but the party administers at his own risk such interrogatories as he thinks he ought to have answered. The person to whom the interrogatories are administered may decline to answer them if they are irrelevant or for any cause which according to the law of England entitles him not to answer. Also he is enabled to do this: if the interrogatories are open to objection under Ord. XXXI. r. 5 because they are either irrelevant or not administered bonâ fide or for any other cause of that kind, he may take out a summons to strike out the interrogatories which are objectionable pointing out as it appears to me those which are objectionable. That seems to me the proper course and when the judge who disposed of these interrogatories in the first instance disposed of them because he said they were thrown at him en bloc and he would not take on himself to dissect the mass he appears to me with all due deference to have applied the objection to the wrong party. The person who had thrown the matter at him en bloc was the person who had called upon him to strike them all out and who had not taken the trouble to go through them and reduce into words or form those objections which he with the assistance of his attorney and counsel had found or supposed he had found. I can conceive a case such that the whole thing or the great mass of it was so utterly irrelevant, so utterly outside the matter in litigation that upon the mere look of them the judge could come to the conclusion that the interrogatories were not bonâ fide and were not delivered for the purpose of getting a real discovery as to the substance of the action and by way of supporting the defence to the action. In such a case the judge would be right in saying 'The whole thing is an abuse, take back your interro-

gatories and reform them : ' it is much simpler to do that than to put your adversary to make his objections.' See also *Grumbrecht v. Parry*, cited *post*, p. 108.

In *Caucley v. Burton*, 32 W. R. 33, interrogatories were struck out en bloc as unnecessary and vexatious, though some might be good, with liberty to deliver reasonable and proper ones. See also *Grumbrecht v. Parry*, cited *post*, p. 108.

See also *post*, p. 298, as to the objection of expense inconvenience or trouble to discovery not clearly material at the stage at which it is sought.

At common law under the C. L. P. Act, 1854, though it was the practice to give leave to deliver particular interrogatories and for this purpose to settle them if necessary (at chambers not in court see *ante*, pp. 99, 101), neither the court nor a judge would take the trouble to settle interrogatories drawn carelessly and with latitude of inquiry as to time and place upon the supposition that the judge would cut them down, nor pick out one or two which might be put and reject all the others: in such cases they were disallowed or sent back to be reformed: see *Robson v. Crawley*, 2 H. & N. 766: *Phillips v. Lewin*, 34 L. J. 37: *Tupling v. Ward*, 6 H. & N. 749, p. 753: 30 L. J. Ex. 222: but see *Alexandra Dock Co. v. Elliott*, 23 L. T. p. 848, considering that these cases laid down too strict a rule for chambers.

It may be observed here that an interrogatory the answer to which may criminate the interrogated party, if relevant to the matters in question, is not "objectionable" within the meaning of the word as used in the above passages: it need not be answered: but the objection to answer it on this ground must be taken in the answer: *Allhusen v. Labouchere*, 3 Q. B. D. 654: *Fisher v. Owen*, 8 Ch. D. 645: and see further *post*, p. 317.

In *Mansfield v. Childerhouse*, 4 Ch. D. 83 (cited *post*, p. 113), interrogatories were struck out under the original rule 5 as wholly irrelevant and an abuse. In *Anon.* W. N. 76, p. 39, they were struck out as being wholly irrelevant, without prejudice to any fresh ones being delivered.

See *post*, p. 111, as to the practice of interrogating to every allegation in the pleadings, which might be dealt with under this provision.



(b) *As to striking out particular Interrogatories.*

Interrogatories may be struck out on the ground that they are prolix oppressive unnecessary or scandalous: see rule 7, *ante*, p. 100.

Under the old rule 5a (see *ante*, p. 100) it will be observed that they could only be struck out if they were scandalous.

(1) *Scandal.*

Scandal or impertinence (see as to impertinence *post*, pp. 122, 117) were well-known terms in the old Court of Chancery: *Fisher v. Owen*, 8 Ch. D. p. 652.

Any proceeding before the court might be objected to for scandal, and the scandalous matter expunged: Dan. Ch. Pr. pp. 290, 296: or even the document containing it taken off the file: *Goddard v. Parr*, 24 L. J. Ch. 783: Dan. Ch. Pr. p. 296.

Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear or is contrary to good manners or which charges some person with a crime not necessary to be shown in the cause: Wyatt's P. R. 383: to which may be added that any unnecessary (not relevant to the subject, *Ex parte Simpson*, p. 477) allegation bearing cruelly upon the moral character of an individual is also scandalous: Dan. Ch. Pr. p. 290, referring to *Ex parte Simpson*, 15 Ves. 476.

A question cannot be put to a party merely because the answer may discredit him. It is not like the case of a witness whose evidence the jury is asked to disbelieve on the ground that he is not a person worthy of credit: *Allhusen v. Labouchere*, 3 Q. B. D. pp. 661, 666. You cannot examine a party as you may a witness: *Finch v. Finch*, 2 Ves. p. 493. A person cannot be interrogated upon every matter upon which he can be cross-examined: *Sheward v. Lonsdale*, 5 C. P. D. p. 49: and see *Whateley v. Crowter*, 5 E. & B. p. 712, and *post*, p. 113. By rule 1 (see *ante*, p. 91) "interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness."

Nothing can be scandalous which is relevant: *Fisher v. Owen*, 8 Ch. D. p. 653: *Lord St. John v. Lady St. John*, 11 Ves. p. 539. Interrogatories though tending to criminate or discredit the party interrogated are not scandalous if they are pertinent and material to the case which the interrogating party is setting up: *Fisher v. Owen*, 8 Ch. D. p. 651. Because an answer strongly reflects it is not to be called scandalous if material and relevant to the justice of the cause: *Coffin v. Cooper*, 6 Ves. 514: and see *Fenhoulet v. Passavant*, 2 Ves. 23. The grossest charges of fraud have frequently had to be made in equity, for instance in bills to set aside deeds for fraud: *ibid.*: of forging a bill or deed: see *Allhusen v. Labouchere*, 3 Q. B. D. p. 660.

If anything is scandalous it must be impertinent: but it may be impertinent without being scandalous: *Fenhoulet v. Passavant*, and see *Everett v. Prytherch*, *post*.

The sole question is whether the matter alleged to be scandalous has a tendency or in other words would be admissible in evidence to show the truth of any allegation in the bill that is material with reference to the relief that is prayed: Lord Selborne in *Christie v. Christie*, L. R. 8 Ch. p. 503, where the scandalous allegation was that the defendant had been charged in a police court for defrauding by false cheques.

In *Baker v. Newton*, W. N. 76, p. 8, interrogatories put for the purpose of shaking the plaintiff's character were struck out.

In a suit to impeach a will as having been obtained by improper influence it was held not impertinent and therefore not scandalous to allege and interrogate to cohabitation between the testator and defendant: *Anon.* 1 M. & C. 78: *Evans v. Owen*, 5 L. J. Ch. 74. An irrelevant allegation by a husband against his wife of adultery was expunged: *Pearse v. Pearse*, 22 W. R. 69: so charges of fraud irrelevant to the issue: *Atwood v. Ferrier*, 14 W. R. 1014: see also *Millington v. Loring*, 6 Q. B. D. 190, an action for breach of promise of marriage where it was held not scandalous to charge seduction, &c. in the claim: *Portsmouth v. Fellows*, 5 Madd. 450, suit by cestui que trust for removal of a trustee imputing misconduct and corrupt motives: *Everett v. Prytherych*, 12 Sim. 365, suit against an executrix and her husband for receiver and injunction charging drunken and disorderly habits: *Fisher v. Owen*, 8 Ch. D. 645, action to set aside a deed of gift made by deceased charging that the instructions and its execution were procured while she was in a state of stupor produced by narcotic drugs, where the Court of Appeal reversing Bacon, V. C. refused to strike out as scandalous (under original rule 5) interrogatories in detailed support of the charge, considering them (see p. 653) to be relevant and put bona fide for the purpose of the case: *Edmunds v. Brougham*, 12 Jur. N. S. 156: *A. v. B.* 8 Jur. N. S. 1141: *Coyle v. Cummin*, 40 L. T. 455.

(2) *Prolix—oppressive—unnecessary.*

These words were not in the old rule 5a.

See as to oppressive discovery, *post*, pp. 298—299.

In equity the court would not relieve the party from his obligation to put in a full answer merely because an interrogatory which could not be said to be actually irrelevant (see *ante*, p. 17, as to the latitude with which questions of immateriality were dealt with) was prolix or unnecessary. The only way of dealing with such a case was by making the party who insisted on the discovery pay the costs of it at the termination of the suit: see *Hoffman v. Postil*, L. R. 7 Ch. p. 678: unless in the case of a bill of discovery, in which the plaintiff had in every case to pay the defendant's costs on his putting in his answer, and where therefore it was for the plaintiff to judge of the materiality: see *Bishop of London v. Fytche*, 1 B. C. C. p. 98. Where however an interrogatory was useless or nonsensical: *Naut v. Scott*, 3 Pri. p. 493: or entirely useless and an answer would have entailed expense and trouble: *Gray v. Bateman*, 21 W. R. p. 138: an answer would not have been compelled: and see *Simpson v. Charlesworth*, 15 Jur. 714: and see further as to the objection of expense and trouble *post*, p. 298.

Under the old rule 5a (see *ante*, p. 100) there was no

provision for striking out any particular interrogatories as being prolix oppressive or unnecessary : unless therefore the interrogatories as a whole could be set aside as being exhibited unreasonably or vexatiously any objection on those grounds must have been taken in the answer : see rule 5a, *ante*, p. 100. Objections of this nature were not, however, often raised in the answer : and the only other remedy was by visiting the other party with the costs under Ord. XXXI. r. 2 : and Add. Rules, Spec. All. 18 (see *post*, p. 116) : a remedy however which was very sparingly used. This is still open under the present rule 3 (in effect as the old rule 2, see *post*, p. 116), and Ord. LXV. corresponding to Add. Rules, Spec. All. 18 : see and other rules as to costs *post*, sect. 5 : and *post*, Ch. VIII. But the provision for striking out interrogatories of this character is, if it can be satisfactorily worked, undoubtedly a more effective remedy.

The old chancery practice of interrogating as a matter of course to every single allegation in the statement of claim without regard to the question whether it is reasonable or not that discovery should be asked for as to those facts, which was held improper under the old rules, and could have been dealt with as a question of costs under the old rules : see *A. G. v. Gaskill*, 20 Ch. D. pp. 526, 529 (a more drastic remedy being there anticipated) : may no doubt be dealt with under this provision : and *post*, p. 449.

It may be noted that the amount of the deposit to be made under rule 26 varies with the length of the interrogatories : see as to the deposit *post*, Bk. III. Ch. VIII. Sect. II.

“ Unnecessary ” does not mean “ irrelevant ” : if an interrogatory is unnecessary because it is irrelevant, the objection must be taken in the answer : *M'Iroy v. Duncan*, W. N. 84, p. 48 : and see *ante*, p. 92.

See *Grumbrecht v. Parry* (cited *post*, p. 459) where ten interrogatories out of twelve were struck out under this rule : see also *Clarke v. Bennett*, *post*, p. 470.

The court will not settle interrogatories which fall within this provision : it will not go through them and dissect the

good from the bad parts: Pollock, B. *Grumbrecht v. Parry*, 49 L. T. p. 571 (in the divisional court): and see *ante*, p. 104: however in the Court of Appeal in this case (see *post*, p. 459), being considered merely prolix, they were cut down to what was legitimate, and the plaintiff was allowed to have them as so altered without going back to chambers.

It may be noted that where an interrogatory is unreasonably wide it need not be answered in full: see *post*, p. 121.

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#### IV. *As to the Objections which can be taken in the Answer.*

An objection may be made to answering an interrogatory on the ground that it is scandalous irrelevant not bonâ fide for the purpose of the cause or matter not sufficiently material at that stage of the action or on any other ground: see rule 6, *ante*, p. 100: and see the old rules, *ante*, p. 100.

In *Voysey v. Cox*, W. N. 76, p. 12, Lindley, J. was of opinion that the original rule 8 (see *ante*, p. 100) was intended to do away with the technicality of answering fully if at all. That this technicality has no application under the present procedure is clear: but that this was the intention of the rule may be doubted. Its purport (and equally that of the present rule 6) seems rather to be analogous to that of the old chancery rule 4 of Consolidated Order XV. which enabled objections to discovery (not objections to relief) which might have been taken by demurrer to be taken in the answer: Morgan, 4th ed. pp. 453—454: *Mason v. Wakeman*, 2 Ph. 516, p. 519: (that is to say a party could not decline answering a particular interrogatory on the ground that the bill was open to a general demurrer: see *ibid.*: and Dan. Ch. Pr. 627).

If fresh facts are relied on as reasons for not answering an interrogatory they should be set out: but if the objection is a mere matter of argument and not a statement of new facts and the judge sees that the answer is sufficient, he is quite right in refusing to require a person to state his objection,

this being the old rule in chancery which is not altered: Lindley, J. in *Smith v. Berg*, 36 L. T. 471, p. 472: 25 W. R. 606. Where an interrogatory or part of it is irrelevant no reason need be given: *Smith v. Berg* (diss. Grove, J.): *Church v. Perry*, 36 L. T. 513, following *Smith v. Berg*. Under the modern chancery practice the party must have stated his reason for refusing to answer any relevant interrogatory: Wickens, V. C. in *Gray v. Bateman*, 21 W. R. p. 138.

The party's oath for the purpose of the claim to protection is conclusive, unless the court is clearly or positively satisfied from certain other sources that it cannot be made available for this purpose, that though the claim is good in law the facts cannot be such as to justify the claim, and this whether the mis-statement has been made deliberately or per incuriam: on grounds of this kind alone can his claim be falsified, his oath disregarded, the answer held insufficient under Ord. XXXI. r. 11, and a further answer ordered: see *Lyell v. Kennedy* (cited *post*, p. 392): (and see *post*, pp. 219, 235, citing *Boices v. Fernie*: and *post*, p. 503, as to disregarding the party's claim to protection against production): and in particular Cotton, L. J. distinguishing between an order for a further affidavit of documents which the court will make on mere suspicion (see *post*, p. 211), and an order for a further answer to an interrogatory. Qu. whether in any case the party would be allowed to file an affidavit to explain the circumstances, see *Lyell v. Kennedy*: as in the case of production of documents for which protection has been insufficiently claimed, see *post*, p. 231. The sources into which the court may look for the purpose of displacing the party's assertions are the answer itself, documents made part of the answer (qu. as to documents scheduled in the affidavit of documents, see *ibid.* Cotton, L. J.), the nature of the thing or subject-matter as regards which protection is claimed, the facts of the case: see *Lyell v. Kennedy*: and see as to the sources into which the court may look for the purpose of testing the sufficiency of an affidavit of documents, *post*, p. 215: and of testing the

party's claim to protection against production, *post*, p. 503. The best course for the interrogating party to take where he thinks that his opponent has answered hastily or loosely or untruthfully is to apply for leave to interrogate the adversary specifically on the points: see Bowen, L. J. in *Lyell v. Kennedy*: and see *post*, p. 133.

In *Lyell v. Kennedy* the defendant refused to answer interrogatories as to certain searches and inquiries he had made on the ground that they came within the scope of the rule of professional privilege: and the plaintiff sought by admissions in the answer, by documents referred to in the interrogatories and answers and documents scheduled in the affidavit of documents to falsify the claim to protection: it was held that they only raised a case of suspicion at the utmost.

A party who had a ground for refusing to answer was not precluded from availing himself of that ground because he had not applied to have the interrogatory struck out, his right to decline answering being expressly reserved to him by the 8th rule (the original rule, see *ante*, p. 100): Cotton, L. J. in *Fisher v. Owen*, 8 Ch. D. p. 654, removing the doubt expressed by Baggallay, L. J. in *Saunders v. Jones*, 7 Ch. D. 435. And so now: "on any other ground."

See as to "scandalous" *ante*, Section III. sub-section (a): "not bonâ fide" *ante*, p. 103: and *post*, p. 308: "not sufficiently material at that stage" *ante*, pp. 24—27: "irrelevant" *post*, sub-section (a): "on any other ground" *post*, sub-section (b).

#### (a) *Immateriality or Irrelevancy.*

See *ante*, p. 16, generally as to the materiality of discovery.

The materiality of a question must in some cases be tested by the consideration whether if it be answered in a particular way it would be material to the case of the party seeking discovery: see *Chadwick v. Chadwick*, 22 L. J. Ch. p. 330: *A. G. v. Corp. London*, 2 H. & T. p. 22: and see *post*, p. 465.

See *ante*, p. 18, as to another test of materiality which must sometimes be applied.

### As to the old chancery practice :

It has been seen *ante*, pp. 17, 31, and see also *post*, p. 299, that it was not the custom for the court to relieve the party from his obligation to put in a full answer on the ground of immateriality unless the discovery was clearly immaterial or was oppressive.

The old practice in chancery\* was that each interrogatory should be founded on a specific allegation or charge: *Redes. Pl. 45*: *Wigr. Pl. 190*: *Madd. ii. 210*: *Dan. Ch. Pr. 407*. In fact interrogatories consisted of the statements and charges in the bill turned into the form of questions. A variety of questions however might be founded on a single allegation in the bill if relevant to it: *Redes. Pl. 45*: *Dan. Ch. Pr. 407*. If a distinct fact was alleged everything incidental to it might be asked as how when &c.: *Bullock v. Richardson*, 11 Ves. p. 376. Thus where it was charged generally that consideration was or was not paid interrogatories might be put asking when and where it was paid and as to all the circumstances necessary to make out whether or not it was paid: *Faulder v. Stuart*, 11 Ves. pp. 301—302: and see *Girdlestone v. North British Co.* L. R. 11 Eq. 197: *Wilson v. Hammond*, L. R. 8 Eq. 323: *M'Garel v. Moon*, L. R. 10 Eq. 22. Although then the plaintiff might ask all questions necessary to make out a general allegation in the bill it was even down to recent times the common practice to make the interrogatories an exact echo of the stating and charging part of the bill: *Dan. Ch. Pr. 408*. But after the Chancery Procedure Act, 15 & 16 Vict. c. 86, it was held not necessary to make imaginary or fictitious allegations, the plaintiff having no knowledge on which to found them, merely for the purpose of founding interrogatories upon them: *Marsh v. Keith*, 1 Dr. & Sm. 342: *M'Garel v. Moon*: *Hudson v. Grenfell*, 3 Giff. 388: *Dan. Ch. P. 408*. Under the old chancery practice the question in reality was not whether the interrogatory was relevant to the bill but whether the allegation in the bill on which the interrogatory was founded was relevant to the general nature of the case made by the bill.

Under the present procedure this practice of turning the pleading into interrogatories is in the first place practically impossible, the pleading itself being a mere skeleton in most cases, and in the second place so far as it might be possible is generally improper: see *ante*, p. 107.

### The common law practice under the C. L. P. Act :

Under the common law system of pleadings the issues were only stated in the most general form, and it was impossible to tell from the pleadings what were the material facts in dispute on which the rights of the parties did or would turn. If therefore the relevancy of the interrogatories was to be determined solely by reference to the issues thus generally stated it is obvious that there would be practically no limit to the ground which they might cover. It was necessary therefore that there should be some interposition between the applicant and the person who might have to pay the costs of the proceedings: and this was supplied by the necessity, (1) of applying for the leave of the judge who would exercise his discretion in determining to what extent and at what time interrogatories should be allowed, and (2) of stating in the affidavit necessary to be filed on such application, see *ante*, p. 97 (or orally to the judge in chambers), the object with which the interrogatories were put and the case intended to be set up: see *Bechervaise v. G. W. R. Co.*

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\* See as to the test of relevancy of a defendant's interrogatories and concise statement section 19 of the Chancery Procedure Act, *ante*, p. 13.



L. R. 6 C. P. p. 37: *Alexandra Dock Co. v. Elliott*, 23 L. T. pp. 847—848: *Croomes v. Morrison*, 5 E. & B. p. 985: *post*, p. 461: and see *ante*, p. 99, as to the objections to this practice.

In *Alexandra Dock Co. v. Elliott*, p. 848, Willes, J. considered that it was the duty of the judge to see that the interrogatories were useful as well as relevant to the particular case set up or intended to be set up. So the same judge in *Bechervaise v. G. W. R. Co.* p. 37, held that it was not sufficient foundation for an application for leave to administer interrogatories that the matter as to which the opposite party was sought to be interrogated was relevant to some issue in the cause, the discretion of the judge being interposed specially to avoid the rigid practice in chancery.

Brett, L. J. in *Hill v. Campbell*, L. R. 10 C. P. p. 236, considered any interrogatories allowable which were *prima facie* material and in support of the applicant's case and in the opinion of the court fair and just.

In the Admiralty Court, to which the provisions as to discovery in the C. L. P. Acts applied, Phillimore, J. decided to follow the equity rather than the common law practice which he considered conflicting, and to allow all interrogatories which tended *bonâ fide* to support the applicant's case and to favour a complete inquiry into the truth of the issue which the court had to decide: *The Mary*, L. R. 2 A. & E. 319, pp. 321—322. See as to the admiralty practice *post*, Bk. III. Ch. III.

Under the present practice though the judge does not (see *ante*, Section I.) in giving leave to deliver interrogatories determine to what extent they shall be allowed according to the practice under the C. L. P. Act (see *ante*), and which worked very badly, see *ante*, p. 99: it is open to apply to have them struck out as unnecessary, see *ante*, pp. 106—108 (but unnecessary does not mean irrelevant: *McIlroy v. Duncan*, *ante*, p. 107) as well as to take the objection in the answer.

The very attenuated form to which pleadings have been reduced under the new rules may result in the same difficulty which was felt at common law in judging of the relevancy of a particular question: see *ante*.

In *Sheward v. Lonsdale*, 42 L. T. p. 173, Brett, L. J. considered that interrogatories must be allowed unless the court could see that the answers could not be relevant; or according to Cotton, L. J. "where they might be relevant": and see *ante*, p. 111, as to the old chancery practice: and *ante*, p. 17.

The obligation of a defendant to answer is a different thing from the question whether his answer is admissible evidence when the cause comes to a hearing: Lord Cairns in *Re Barned's Banking Co.* L. R. 2 Ch. p. 354.

Interrogatories are admissible to discover facts which will inform the party as to evidence to be obtained: see Jessel,

M. R. in *A. G. v. Gaskill*, 20 Ch. D. p. 528: (and see *ante*, p. 68, referring to *Glascott v. Copper, &c. Co.*: and *ante*, p. 84, as to the answer of an officer of a corporate body): see also *Re Ottoman Co. post*, p. 297: to discover the names of persons who may give evidence in his favour: see *Hall v. Liardet*, W. N. 83, p. 175: (but see further *post*, p. 473): see also as to production of documents which will put the party on the track of evidence or of the names of persons whom he may call as witnesses *post*, pp. 185—186.

In *Sketchley v. Connolly*, 11 W. R. 573 (also cited *post*, Bk. II. Ch. III.) Blackburn, J. considered that it was not necessary that the answers should be strictly evidence, if the party would clearly derive material benefit in the cause from the discovery; and so Crompton, J. in reference to the particular discovery here required namely the name of the real defendant (see *ante*, p. 89), considered that as the declarations of the real defendant would be evidence the answer disclosing his name would be the first step to obtaining it.

Interrogatories which do not relate to any matter in question in the cause or matter shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness, Ord. XXXI. r. 1 (see *ante*, p. 91). The functions of cross-examination and discovery are different, Lindley, L. J. in *A. G. v. Gaskill*, 20 Ch. D. p. 530: and see *ante*, p. 105.

The following are instances of irrelevant discovery in equity and under the Jud. Act.

*Bishop of London v. Fytche*, 1 B. C. C. 96: *Mayor of London v. Anstie*, 1 Anstr. 158: *Selby v. Crew*, 2 Anstr. 605: *Baker v. Pritchard*, 3 Atk. 387: *Hincks v. Nelthorpe*, 1 Vern. 204: *Agar v. Regent's Canal Co. Coop.* 212: *Codrington v. Codrington*, 5 Sim. 519: *Wilts, &c. Co. v. Swindon, &c. Co.* 20 W. R. 353: *Harvey v. Morris*, Finch, 214 (discovery of names of persons for whom a mortgagee was trustee: and see *Moor v. Roberts*, cited *post*, p. 462: *Jones v. Pugh*, cited *post*, p. 376: and *Mansfield v. Childerhouse*, 4 Ch. D. 83, action for specific performance, the defendant's interrogatories, inquiring whether the plaintiffs were not committing a breach of trust in applying the trust funds in the purchase and as to the nature of the trusts, being struck out under original rule 5, see *ante*, p. 100, as irrelevant and an abuse).

Discovery of a party's means has been ordered where it is clearly relevant (see further *post*, p. 300, as to discovery of this nature). In an action for seduction discovery of the defendant's means is irrelevant, but not in action for breach of promise of marriage: *Hodsoll v. Taylor*, L. R. 9 Q. B. 79, p. 81. But in a breach of promise action interrogatories by the plaintiff inquiring into

the defendant's expectation of means and the names of his relations and as to whether any settlement had been made by them on his present wife were disallowed: *Anon.* W. N. 76, p. 22. In *Small v. Attwood*, Wigr. Pl. 241, it was held impertinent to inquire into the defendant's means in order to support an injunction restraining him from transferring a sum of stock on the ground that he had no property to satisfy the plaintiff's claims other than this stock. A vendor in a bill for specific performance cannot interrogate the defendant as to his property or means: *Francis v. Wigzell*, 1 Mad. p. 261.

Discovery may be had of a woman's separate estate where the action is so framed as to charge it: *ibid.* pp. 261—262: *Smith v. Berg*, 36 L. T. 471: 25 W. R. 601: and see as to a married woman *ante*, p. 67. In *Smith v. Berg* a builder sued a man and woman as man and wife to recover from them jointly or severally the value of work done at certain houses at the wife's request. An interrogatory asking them if they were married was struck out (under the original rule 5: see *ante*, p. 100), for they were sued as man and wife: and in answer to interrogatories asking whether the houses belonged to the woman for her separate use or for what estate or how they came to her, the woman answering that they "do not nor did they ever belong to me for my separate use"; and in answer to an interrogatory asking the man what he knew as to any separate or other estate or property of the co-defendant, the man answering that he did not know of any separate estate or property of her; it was held that the rest of the interrogatories were irrelevant, for the plaintiff's case was that they were man and wife and that she had separate estate.

In a suit to set aside a sale from father to son as being made without consideration the latter as defendant was compelled to discover his resources means of paying and how the money was provided for the alleged consideration: *Newton v. Dimes*, 3 Jur. N. S. 583.

In *Sheward v. Lord Lonsdale*, 5 C. P. D. 47, the plaintiff's claim was in respect of horses sold to the defendant; and the defence among other things denied that they were sold to him and also alleged that the prices were exorbitant. Interrogatories (among others) to the following effect were administered by the defendant:—1. The dates when the horses sold to the defendant were purchased by the plaintiff, 2. Whether the plaintiff did purchase them or was owner of them, 3. The amounts of the purchase monies, 4. If the plaintiff was not owner how he had them in his possession, 5. Dates of his receiving them into his possession, 6. Whether the defendant ordered them and the dates at which they were ordered. The plaintiff having declined to answer any of them as being immaterial to the issue in the action was ordered to make a further and better answer except as to the 6th which was struck out by consent. On appeal (affirmed in the Court of Appeal 42 L. T. 173) the 2nd, 4th, and 5th were disallowed (or rather the plaintiff was relieved from answering them) as being too remote and requiring the plaintiff to state in detail how their business was conducted: the 1st and 3rd were with some hesitation allowed to stand, the prices in such a case being material as a test of value, though otherwise in the case of a picture: see *Cotton*, L. J. in the Court of Appeal. See also *Leigh v. Brooks*, cited *ante*, p. 37: and *Donegal v. Stewart*, cited *ante*, p. 32.

Where the seller of a horse brought an action against the auctioneer (who had sold it for him) for the price and the defendant alleged that the plaintiff had fraudulently represented it to be quiet, the plaintiff was not compelled to answer whether the horse was his property at the time of the sale nor if it was how it became so: *Sivier v. Harris*, W. N. 76, p. 22.

In an action by cargo owners against the shipowners for non-delivery of the cargo the plaintiffs were held not bound to answer whether, with whom, and to what amount the cargo was insured as immaterial: *Bolckow v. Young*, 42 L. T. 690.

See also the cases cited *ante*, p. 31 to p. 34, where discovery of a party's private or business affairs was refused either as wholly immaterial or as immaterial at that stage of the action: and see *post*, p. 300.

Where a wholly immaterial interrogatory had been partially answered, a full answer could not be required even under the technicality of the chancery practice: *Wood v. Hitchins*, 3 Beav. p. 512.

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(b) "*On any other Ground.*"

See as to the established objections or exceptions to discovery, *post*, p. 309.

Interrogatories as to matters of law.

Interrogatories as to matters of law (though alleged in the bill and material to the plaintiff's case, for they are not properly the subject of admission, Wigr. Pl. 187), or as to inferences of law drawn from facts need not be answered: Dan. Ch. Pr. p. 625. They must be confined to questions of fact: see Redes. Pl. 34: Spence, Eq. Jur. 677: *Flight v. Robinson*, 8 Beav. p. 33: *Hoffmann v. Postil*, L. R. 4 Ch. 673. Interrogatories asking a surveyor in an action against him for negligence whether it was part of his duty to take certain steps under his instructions were held inadmissible as asking matter of law: *Whateley v. Crowter*, 25 L. J. Q. B. p. 165. Because an interrogatory refers to a document, as for instance to the specification of a patent it does not thereby necessarily cease to be a question of fact: *Hoffmann v. Postil*, L. R. 4 Ch. p. 679.

But it was held necessary to answer a charge of being trustee though it would seem to have involved a question of law: *Culverhouse v. Alexander*, 2 Y. & C. 218.

Interrogatories asking a party as to French law were struck out: *Phillips v. Barron*, W. N. 76, p. 54.

Interrogatories as to documents.

After the Chancery Procedure Act an interrogatory asking for a list of all documents relating to the matters in question was held improper, at all events if the party professed his willingness to make the usual affidavit, but if he answered it partly, he would be ordered to answer it fully: *Piffard v. Beeby*, L. R. 1 Eq. 625: *Law v. London Indisputable Co.* 10 Ha. App. 20: *Kidger v. Worswick*, 5 Jur. N. S. 37: *Barnard v. Hunter*, 1 Jur. N. S. 1065: Dan. Ch. Pr. p. 1675.

Under the original rules of the Jud. Act a party was in every case justified in refusing to answer such an interrogatory: see for instance *Bannicott v. Frith*, W. N. 76, p. 9: *Carter v. Leeds*, *ibid.* p. 11: *Pitten v. Chattenburg*, W. N. 75, p. 248: where they were struck out under the original rule 5, see *ante*, p. 100: otherwise it would have been used as a means of evading the necessity of coming to the court for an order under rule 12, no order for interrogatories after claim or defence respectively up to the close of the pleadings being then requisite: see *ante*, p. 94.

The practice is the same under the present rules, although as a rule interrogatories cannot be delivered without an order, rule 1 (see *ante*, p. 90): for an order for discovery of documents is discretionary (but see further, *post*, p. 156): Mathew, J. in *Jacobs v. G. W. R. Co.* W. N. 84, p. 33, where leave to deliver interrogatories having been given, an interrogatory as to documents was included in order to avoid the necessity for making a fresh deposit in respect of an order for discovery of documents.

An interrogatory asking as to the possession of particular documents was legitimate under the chancery practice: see *Catt v. Tourle*, 18 W. R. 966: and so now *Webb v. East*, 5 Ex. D. 23: and see *post*, p. 212. as to interrogatories directed to particular documents after a sufficient affidavit of documents has been made.

So for a list of documents relating to a particular matter: see *Rishton v. Grissel*, 14 W. R. 578: and now *Sicanston v. Lishman*, 45 L. T. 360, cited *post*, p. 226 (after an affidavit of documents).

See as to interrogatories inquiring into the contents of documents: *post*, VI. (e).

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#### V. *As to the Costs occasioned by Answering Interrogatories which are Unnecessary or of Improper Length.*

By Ord. XXXI. r. 3, see *post*, Bk. III. Ch. VIII. the costs occasioned by interrogatories exhibited unreasonably vexatiously or at improper length and the answers thereto may be directed to be paid by the party in fault: and see also Ord. LXV. r. 27 (20), *post*, Bk. III. Ch. VIII. as to the costs of interrogatories which are improper vexatious unnecessary or contain vexatious or unnecessary matter or are of unnecessary length: and see also generally as to costs, *post*, Bk. III. Ch. VIII. It is conceived therefore that the party may answer interrogatories of this nature and is not bound to apply to have them set aside, or struck out, or to decline answering them at length. See further in connection with this point the subject of unreasonably wide interrogatories, *post*, VI. (c): and prolixity in answering, *post*, VI. (d).

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#### VI. *As to the Mode of Answering.*

(a) As to explaining or qualifying an answer or inserting therein matter of defence or impertinent matter or matter of supererogation, (b) as to the particularity of an answer and an evasive or embarrassing answer, (c) as to answering unreasonably wide interrogatories and a substantial answer, (d) as to prolixity in answering, (e) as to setting out the contents of referring to or incorporating documents, (f) as to accounts, (g) as to answering according to the party's knowledge information and belief.

(a) *As to Explaining or Qualifying an Answer or Inserting therein Matter of Defence or Impertinent Matter or Matter of Supererogation.*

It may under some circumstances be legitimate for a party to explain, or qualify, or give his reasons for making, a particular answer: see *Hall v. Liardet*, *post*, p. 467: *Anon. W. N.* p. 39, *post*: *Lyell v. Kennedy* (cited *post*, p. 392): and see *post* as to stating the grounds of belief. Where a party was asked whether he had not in some previous proceedings sworn an affidavit to such and such an effect, and in his answer admitted the affidavit but said that since swearing the affidavit he had been informed that the information on which such affidavit had been based was erroneous, and therefore that the statements in the affidavit were contrary to facts, and corrected such statements, it was held not improper: *Lyell v. Kennedy*.

Where a party inserts matter of this explanatory or qualifying nature, or any matter being of the nature of his defence to the action, or in fact any impertinent matter or matter of supererogation as it has been called, the interrogating party may, if he considers that he is embarrassed or prejudiced by such insertion, take one of two courses according as the matter is or is not separable from the answer proper. Where it is so separable, he may wait until the trial and then claim to read only the answer proper, and leave out the other matter: see *Lyell v. Kennedy* (cited *post*, p. 392): *Compagnie Financiere, &c. v. Peruvian Guano Co.* 28 S. J. p. 410: and see *post*, p. 118, as to reading part of the answer. Where it is not so separable, he may apply for a further answer, for an embarrassing (that is to say which prevents the interrogating party from using it at the trial without having thrust upon him irrelevant matter as part of it, see *Lyell v. Kennedy*: and see further *post*, p. 120, as to an embarrassing or evasive answer) answer is an insufficient answer under Ord. XXXI. r. 11: see *Lyell v. Kennedy*.

Matter of supererogation might render the answers technically insufficient so as to justify an order for *vivâ voce* examination under the C. L. P. Act, section 53 (see *post*, p. 147): *Peyton v. Harting*, L. R. 9 C. P. 9. It was

for the judge in his discretion to say whether the supererogatory matter was of that amount or nature as to render the answers insufficient: *ibid.* : but qu. whether he would be justified in so regarding it unless (see Keating, J. *ibid.* p. 10) it was improper or impertinent as destroying the effect of the answers or introducing irrelevant topics: and see Bowen, L. J. in *Lyell v. Kennedy*, approving this case.

In *Anon.* W. N. 76, p. 39 (under the rules of the Jud. Act) the plaintiff objected to the defendant's answer to an interrogatory on the ground that it stated his defence to the action as well as answered the interrogatory, and that under Ord. XXXI. r. 23 (see now Rule 24, Bk. III. Ch. IX. Sect. V.) he could not read one portion of the answer without the other: Lindley, J. refused to compel the defendant to split up his answer to suit the plaintiff's convenience, for, though in some cases such an application might be granted, in this case the part objected to was by way of qualification of the other part of the answer.

It is admissible (and perhaps obligatory see *post*, p. 128) for the party to state the grounds of his belief: *Lyell v. Kennedy*, 9 App. Cas. pp. 92, 93: and see *Parker v. Fairlie*, 1 S. & S. 295, p. 300: T. & R. 362, p. 363, where the defendant referred to affidavits and certificates of other persons as justifying his belief in the good quality of certain articles. "A man surely would be at liberty, if he was bound to state his belief to state his reasons for it, and to say 'That is my belief founded upon these reasons, and upon that information which has been given to me but I require the defendant to prove his case by something other than my belief. My belief may be *prima facie* evidence when we get before a jury or before the tribunal which is to decide the matter for aught I know, but still I desire it to be open to me, because the information given to me may not be accurate: the jury may not adopt it: they may think that I have drawn a conclusion unfavourable to myself without sufficient reason for doing so,' but he cannot avail himself of that right without stating what his information is:" Bramwell, L. *ibid.* p. 93: and see further as to this case *post*, p. 362. But an admission of belief has been generally treated as an admission of the fact: see *post*, p. 127.

See as to prolixity in answering *post* (d).

It is legitimate to claim protection in the answer to interrogatories for any document therein referred to: *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* 28 Sol. J. p. 410.

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(b) *As to the Particularity of an Answer and an Evasive or Embarrassing Answer.*

In former days the substitution of an "and" for an "or" would make the answer insufficient, but now it is the substance and not the form at which the court looks: if it is substantially answered, it is sufficient: see *Lyell v. Kennedy* (cited *post*, p. 392): and *post*, p. 121.

The following rules 17 and 19 of Ord. XIX. (20 and 22 under the old rules) relating to the mode of pleading are equally applicable to the mode of answering interrogatories:—

It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds ("facts" in the old rule 20) alleged by the statement of claim or for a plaintiff in his reply to deny generally the grounds ("facts" see *ante*) alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth except damages.

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum or any part thereof or else set out how much he received. And (according to the old rule 22 "so when a matter of fact is alleged with divers circumstances it shall not be sufficient to deny it as alleged along with those circumstances but a fair and substantial, see *post*, p. 121, answer must be given") if an allegation is made with divers circumstances it shall not be sufficient to deny it along with those circumstances.

They in fact express accurately and are adopted from the rules and practice in chancery in respect of the answer: see *Redes. Pl. 44, 309: Dan. Ch. Pr. 630: Tipping v. Clarke, 2 Ha. pp. 389—390: Mountford v. Taylor, 6 Ves. p. 791: Coop. Eq. Pl. 313: Consol. Ord. XV. r. 2: Beames, Ch. O. pp. 28—29. If a defendant deny a fact he must traverse it directly and not by way of negative pregnant: Beames, Ch. O. p. 29: and see Culverhouse v. Alexander, 2 Y. & C. 218: Consol. Ord. XV. r. 2. The rule in equity was always that where there was a specific averment an interrogatory founded upon that specific averment must have been specifically answered; a general denial was not a sufficient answer to a specific averment: *Earp v. Lloyd, 4 K. & J. p. 60: though a general answer might include in it an answer to the particular inquiry yet such a mode of answering might in some**

cases be resorted to in order to escape from a material discovery; particular charges must therefore be answered particularly and precisely: *Wharton v. Wharton*, 1 S. & S. p. 236. For instance where a defendant was asked whether he had not had communications with A, B, and other persons and admitted them with A but denied them with any other person, omitting B, it was insufficient: *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 281: see for other instances where interrogatories have been insufficiently answered in this respect *Patrick v. Blackwall*, 17 Jur. 803: *Rishton v. Grissel*, 14 W. R. 578, 789: *Bally v. Kenrick*, 13 Pri. 291: *Jodrell v. Slaney*, 10 Beav. 225: *A. G. v. Dinorben*, 2 Jur. 129: *Denys v. Locock*, 3 M. & C. p. 321: *Daniel v. Bishop*, 13 Pri. 15.

The form of inserting after a general denial the words "except as aforesaid" was considered by Wigram, V. C. in *Tipping v. Clarke*, 2 Ha. p. 388 to be objectionable, as making it difficult to decide whether the answer was sufficient or not, and as being sometimes evasive; and see *Earp v. Lloyd*, 4 K. & J. 58: and *Lyell v. Kennedy*, cited *post*, p. 392 ("subject to such explanation as aforesaid and to the submission hereinafter contained," and see further *ante*, p. 117).

He may refer to the whole of his affidavit in answer to interrogatories and is not confined simply to those passages which purport to deal with a particular interrogatory: see Cotton, L. J. in *Lyell v. Kennedy*, where the party craved leave to refer to a former answer to other interrogatories; see *post*, Bk. III. Ch. IX. Sect. V. as to reading part of an answer. But where an answer was put in with cross references and otherwise so complicated that it would be difficult to say what had or had not been sworn to, it was ordered to be taken off the file: *Walker v. Daniell*, 27 W. R. 595: 30 L. T. 357: and see *Lyell v. Kennedy*: but see *post*.

Where an answer is evasive illusive or embarrassing (see *ante*, p. 117) the court may either order it to be taken altogether off the file (as in chancery according to the later practice: Dan. Ch. Pr. p. 685; *Thomas v. Lethbridge*, 9 Ves. 463: and cases cited *post*, p. 144: though not the earlier practice:

*Marsh v. Hunter*, 3 Mad. 437) : see *Furber v. King*, 29 W. R. 536 : 50 L. J. Ch. 496, where Bacon, V. C. considered the whole answer an evasion and attempt to baffle the adversary : or as this is a cumbrous and expensive cure for the evil, the court will order a further answer : see *Lyell v. Kennedy* (cited *post*, p. 392) : and *Hill v. Hart Davis* and *Walker v. Poole*, *post*, p. 229, as to prolix affidavits of documents. See also in illustration of an evasive or contradictory answer *Latimer v. Neate*, *post*, p. 259.

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(c) *As to Answering unreasonably wide Interrogatories and a substantial Answer.*

See *ante*, p. 106, as to striking out interrogatories : and *ante*, p. 116, as to costs of answering unnecessary interrogatories.

Where an interrogatory is unreasonably wide Jessel, M. R. in *Parker v. Wells*, 18 Ch. D. p. 485, considered that a party was not bound to put in an answer such as he would have been obliged to give if the interrogatory had been properly limited ; but that the judge should ask the interrogating party whether he would be content with properly limited discovery, and if he assents, should order the other party to make a further affidavit in that respect : and see *Hall v. L. & N. W. R. Co.* 35 L. T. p. 849. In the same case it was held by Jessel, M. R. and Brett, L. J. (Cotton, L. J. p. 487, dissenting) that the Court of Appeal would make no such order for limited discovery and that if the interrogating party insists by his appeal on a full answer he must stand or fall by that claim.

See *ante*, pp. 104, 107, as to interrogatories framed with undue latitude and in particular the common law practice relating thereto.

A substantial answer is sufficient : see *Bolckow v. Fisher*, 10 Q. B. D. p. 170 : *Lyell v. Kennedy*, *ante*, p. 119 : *Hall v. L. & N. W. R. Co.* 35 L. T. p. 849 : and see Ord. XIX. r. 22 of the old rules, *ante*, p. 119. Although particular interrogatories were not answered precisely in all their terms

it was considered under the old chancery practice to be sufficient if they were fairly and substantially answered with reference to the scope and object of the bill or the matters really in question: see *Bally v. Kenrick*, 13 Pri. 291: *Reade v. Woodroffe*, 24 Beav. 421: *Lockett v. Lockett*, L. R. 4 Ch. 336: *Jodrell v. Slaney*, 10 Beav. p. 231: Dan. Ch. Pr. 630.

As a rule only the substance of conversations need be given: see *post*, p. 456.

See as to giving the contents of documents, *post*, p. 123.

Where a company were interrogated in wide terms as to the powers and authorities possessed by and duties of different officers and agents of the company, it was held sufficient to answer that they had none relating to the matters in question: *Compagnie &c. Pacifique v. Peruvian Guano Co.* 28 Sol. J. p. 410.

See as to amending interrogatories under such circumstances, *post*, p. 149.

Qu. whether a party is justified in answering an unnecessarily wide interrogatory in reliance on the provisions of the rules referred to *ante*, Sect. V. for throwing the costs on the party seeking the discovery: and see further, *post*, p. 123.

#### (d) *Prolivity in Answering.*

A party must not be needlessly or unduly prolix in answering. He may be visited with the costs of doing so under Ord. LXV. r. 27 (20) see *post*, Bk. III. Ch. VIII.; and in an extreme case, if the prolixity is so great as to be embarrassing, the court might order the document to be taken off the file or order a further answer: see *Lyell v. Kennedy* (cited *post*, p. 392): and *ante*, p. 121, referring to this case, and to the subject of prolix affidavits of documents.

Such needless or undue prolixity was termed impertinence under the chancery practice: *Slack v. Evans*, 7 Pri. pp. 298—299, n.: *King v. Teale*, *ibid.*: and see *Barry v. Harrison*, You. & C. 279. Matter might be impertinent without being exactly irrelevant: *Parker v. Fairlie*, T. & R. pp. 364—365.

Impertinences were described by Lord Chief Baron Gilbert to be "where the records of the court were stuffed with long recitals or long digressions of matters of fact which were altogether unnecessary and totally immaterial to the matter in question as where a deed was unnecessarily set forth in hæc verba": Gilb. For. Rom. 209 cited Dan. Ch. Pr. p. 292. By the Chancery Procedure Act, sect. 17, exceptions for impertinence were abolished and the party introducing the impertinent or unnecessary matter might be visited with the costs occasioned by its introduction: Dan. Ch. Pr. p. 292.

It was sometimes difficult to frame a full answer so as to prevent exceptions for impertinence and redundancy: Lord Langdale in *Jodrell v. Slaney*, 10 Beav. p. 229.

Mere prolixity in answering would not necessarily amount to impertinence. And of course there could be no general rule: it must be a question of degree to be determined in each case by the judge: *Gompertz v. Best*, 1 Y. & C. pp. 117—118: *Lowe v. Williams*, 2 S. & S. p. 574: *Anon.* 2 L. J. Ch. (O. S.) 143: Dan. Ch. Pr. pp. 631—632: and see *post*, p. 126, as to accounts.

Qu. whether a party is justified in setting out useless and impertinent matter even if the terms of the interrogatory warrant it in reliance on recovering the costs under the rules referred to *ante*, Sect. V.: see also *ante*, p. 122: and *post*, p. 126, as to accounts.

These questions of prolixity generally arose in connection with accounts, as to which see *post*, sub-sect. (f).

See *post*, sub-sect. (e) as to offering inspection of documents by way of answering interrogatories.

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(e) *As to Setting Out the Contents of Referring to or Incorporating Documents.*

Where a party is interrogated as to matter which is contained in any document he may (and probably, see *ante*, sub-sect. (d) as to prolixity, is bound to do so if he can) offer inspection of the document if thereby expense or delay will

be avoided instead of setting out the matter in his answer: (and see now rule 2 cited *ante*, p. 91). Where interrogatories are of a character which would make it oppressive to compel the party to set out precisely all the particulars called for, the party is justified in answering by reference to books, if he says they contain the best information which he is able to give in answer to the interrogatories: *Drake v. Symes*, Johns. p. 652, referring to *White v. Williams*, 8 Ves. p. 193. But the reference ought to be accompanied with such explanations and to be made in such a manner as to make it as convenient as possible for the other party to consult them: the party must point out the best way in which the information could be got from the documents, not for instance refer his opponent to a number of books as containing the required information without saying in what books the different particulars of information were to be found: *ibid.* pp. 652—653 (an action by a shareholder against the directors of an insurance company interrogating as to the lives ages dates and other particulars of a number of policies): and see *Christian v. Taylor*, p. 408: and *Marshall v. Mellersh*, 6 Beav. 558: and *post*, p. 126, as to accounts. Correspondence need not be set forth at full length where inspection can be offered: *Hoffmann v. Postil*, L. R. 4 Ch. 673, p. 678: Harr. Newl. 185.

See further as to a party's obligation to set out the contents of documents, *post*, p. 473.

As a general rule a party could not refer to any document as a part of his answer unless he filed it as a schedule to his answer and prayed that it might be taken as part of his answer: *Boldero v. Saunders*, 3 N. R. 59: Dan. Ch. Pr. 631, 634, 658.

Where a defendant referred to other affidavits and depositions by him in the suit as containing the answer he wished to make, the document was ordered to be taken off the file though he did it to save expense: *Turner v. Jack*, 19 W. R. 433: so where he referred to his answers to similar interrogatories in another suit: *Hudson v. Grenfell*, 3 Giff. 388.

He may refer to his answers to others of the interrogatories: see *Lyell v. Kennedy*, *ante*, p. 120.

Qu. whether printed documents could be filed as schedules: see Dan. Ch. Pr. 658: *Wright v. Wilkin*, 9 Jur. N. S. 195: 11 W. R. 253: *Lafone v. Falkland, &c. Co.* 3 K. & J. 267: or whether they should not be deposited in court and then referred to as part of the answer: Dan. Ch. Pr. 631, 634, 658: *A. G. v. Edmunds*, 15 W. R. 138, where this was said to be the proper practice in reference to certain parliamentary blue books and other printed documents.

But this did not authorize a party to refer to documents not previously in existence but prepared for the purpose of the case: in other words a party could not avoid setting out matter in his answer either in the body of it or in a schedule by putting this matter into a separate document and then referring to it: *Telford v. Ruskin*, 1 Dr. & Sm. 148, p. 149, where the defendant made out some accounts in a book, and referred to them in his answer but refused to set them out on the ground that to do so would expose the names and private affairs (see as to this objection *post*, p. 306) of his customers: and see *Alsager v. Johnson*, 4 Ves. p. 224.

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(f) *Accounts.*

The question of setting out accounts in answer to interrogatories has been considered in connection with the subject of consequential discovery, see *ante*, pp. 21, 25—34.

It is sufficient to say here that discovery of accounts which are consequentially relevant, and not material for the determination of any question at the hearing, (not sufficiently material at that stage see Ord. XXXI. r. 6, *ante*, p. 108) will as a rule under the provisions of Ord. XXXI. rr. 6, 20, be postponed unless they are such as may be material for the purposes considered *ante*, p. 28.

Qu. whether in any case minute and detailed accounts such as might have to be given after decree would be enforced: see *Elmer v. Creasy*, L. R. 9 Ch. p. 73: or at all events the court would consider what useful object could be served by compelling such an account: see *Lockett v. Lockett*, L. R. 4



Ch. p. 341, referring to *White v. Barker*, 5 D. G. & Sm. 746 : certainly not where inspection can be offered, see *post* : and see *Robinson v. Lamond*, 5 Jur. 240.

A party was not only not bound to set out accounts in full, he was not even justified in doing so though the terms of the interrogatories might apparently warrant him in doing so : see Dan. Ch. Pr. 632. But where the adversary pertinaciously insisted on a full disclosure Lord Eldon doubted whether he could reasonably be allowed to object to the disclosure made in consequence of his so insisting : *Norway v. Rowe*, 1 Mer. p. 356 : and see *Robson v. Brougham*, 19 L. J. Ch. 465.

Undue prolixity in setting out accounts might undoubtedly amount to impertinence : see *ante*, sub-sect. (d).

Items in accounts should not have been given unless specifically called for : *Norway v. Rowe*.

No rule however could be laid down as to the minuteness with which they might be given without degenerating into impertinence. It must have depended on the nature of the case and the purpose for which they were required. See the following cases, and Dan. Ch. Pr. pp. 631—632 : *Frend v. Jacko*, 1 Mer. 357, n. : *Norway v. Rowe*, 1 Mer. 347 : *McMorris v. Elliott*, 8 Pri. 674 : *Slack v. Evans*, 7 Pri. 278, n. : *Alsager v. Johnson*, 4 Ves. 217 : *Byde v. Masterman*, C. & P. 265 : *Marshall v. Mellersh*, 6 Beav. 558 : *Tench v. Cheese*, 1 Beav. 571 : *Gompertz v. Best*, 1 Y. & C. 114 : *Parker v. Fairlie*, 1 T. & R. 362 : *Lowe v. Williams*, 2 S. & S. p. 574 : and see *ante*, p. 124.

The accounts were generally set out in a schedule.

In many cases where great labour and expense amounting to oppression would be involved in setting out the required accounts, a party was justified in referring to books in which the accounts were contained and offering inspection of them to his opponent for this purpose : *Telford v. Ruskin*, 1 Dr. & Sm. p. 149 : *White v. Barker*, 5 D. G. & S. 746, p. 752 : *Christian v. Taylor*, 11 Sim. 401, p. 408 : *White v. Williams*, 8 Ves. p. 193 : *Drake v. Symes*, Johns. 646 : Wigr. Pl. 283 : *Alsager v. Johnson*, p. 224 : *Alison v. Do. ante*, p. 30 (where

an executor was allowed to answer by verifying accounts already delivered) : and see *ante*, sub-sect. (e).

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(g) *As to Answering according to Knowledge Information Remembrance and Belief.*

The party must answer according to the best and utmost of his knowledge information remembrance and belief : see 19th Ord. 1841 : Dan. Ch. Pr. p. 627 : *A. G. v. Rees*, 12 Beav. p. 54 : *The Minnehaha*, L. R. 3 A. & E. p. 152 : and *Lyell v. Kennedy*, 9 App. Cas. p. 85.

He must either admit the fact or deny having any knowledge or information on the subject or any recollection of it and declare himself unable to form any belief concerning it : Redes. Pl. 44 : or must use some expressions equivalent thereto : Dan. Ch. Pr. p. 628 : *Amherst v. King*, 2 S. & S. 183.

“Belief or otherwise” has generally been held to be sufficient : Dan. Ch. Pr. p. 628 : *A. G. v. Rees*, 12 Beav. p. 54 : *Robinson v. Lamond*, 15 Jur. 240 : but under some circumstances it may not be sufficient, where for instance there may be ground for suspicion that the party wishes to evade swearing as to his information : see *A. G. v. Rees*, 12 Beav. 50 and *Robinson v. Lamond*, 15 Jur. 240 : and see as to information of agents, *post*, (B) at p. 140.

“It may be true for anything he knows to the contrary” is not alone sufficient : Dan. Ch. Pr. p. 628, referring to *Amherst v. King*, 2 S. & S. 183.

“No documents &c. to his knowledge” is not sufficient : Mad. ii. 517.

An admission of belief seems to have been treated as an admission of the fact in ordinary cases : see *Potter v. Potter*, 1 Ves. sen. 274 ; but in *Hill v. Binney*, 6 Ves. 737 it was treated as doubtful : and qu., for see *ante*, p. 118, citing Bramwell, L. in *Lyell v. Kennedy*. Qu. whether for this or any other purpose (see *post*, p. 502) “I am informed” is

equivalent to "I believe" as said in *Woodhatch v. Freeland*, 11 W. R. 398.

As to facts not happening within his own knowledge (see as to what is personal knowledge per Lord Watson in *Lyell v. Kennedy*, p. 90) he must answer as to his information and belief and not his information merely without stating any belief either one way or the other: Coop. Eq. Pl. 313: as to the act of another which defendant does not certainly know he ought to say he thinks or believes it to be true or does not, and not say only that he has heard: Wyatt, P. R. 14.\* But qu. whether if he states that he has formed no belief on the subject he can be pressed further: see Lord Watson in *Lyell v. Kennedy*, 9 App. Cas. pp. 90—91: and *Nelson v. Ponsford*, post, p. 129. See as to what is belief: *Lyell v. Kennedy*, pp. 90—91, per Lord Watson.

He is also bound to state the grounds on which his belief is founded in order that the reality and value of his belief may be tested: per Lord Watson in *Lyell v. Kennedy*, 9 App. Cas. p. 22: see also the interrogatories in *Wood v. Hitchins*, 3 Beav. 504: (see also ante, p. 118, as to his being at liberty to state the grounds): see further as to this case, post, pp. 129, 130: and as to his obligation to disclose his information, post, (B) at p. 134. See also *Re Barned's Banking Co.* L. R. 2 Ch. p. 353, where it was held admissible to ask a liquidator as witness, but who was for this purpose in the same position as a defendant, as to the grounds and the materials on which he had come to a particular conclusion, and in particular per Cairns, L. J. the grounds on which he founded his belief.

(α) As to his recollection of matters within his own knowledge (1) generally (2) in particular of the contents of documents.

(β) As to his information.

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\* And the form of swearing an answer is framed on this footing, that is to say, the party swears that as to his own acts and deeds it is true to his knowledge, and as to those of other persons he believes it to be true: see Braithw. 388: *A. G. v. Hudson*, 9 Ha. App. 63.

(a) *As to his Recollection of Matters within his own Knowledge*  
 (1) *Generally*, (2) *In particular of the Contents of Documents*.

(1) *Generally*.

Lord Clarendon seems to have made an order that an answer to a matter charged as the defendant's own act must be direct without saying it is to his remembrance or as he believeth, if it be laid as done within seven years before: see Beames, Ord. 28—29: Wyatt, P. R. 13. And so it is laid down in Coop. Eq. Pl. 314, as to facts within the defendant's own knowledge (see *ante*) happening within six years, or being recent: see *Williams v. Leighton*: and *Oscald v. Pennant*, Tothill, 9: and in Spence, Eq. Jur. 680, within three years. But the court might find special cause to dispense with so positive an answer: Wyatt, P. R. 14.

With respect to this rule Lord Langdale in *Nilson v. Ponsford*, 4 Beav. p. 43, expressed himself thus, "With regard to the rule stated that a man must either admit or deny his own recent acts, it is possible that a defendant with the most delicate conscience may be unable to do so: and I know of no means by which a discovery can be obtained from a defendant as to matters on which he swears he is ignorant. All that the court can do is to get from him such an answer as he swears he is able to give: it can do no more than compel him to state the impression on his mind. If his statement be untrue he will be liable to the penalties of perjury." See also *Lyell v. Kennedy*, *ante*, p. 128, per Lord Watson: and *post*, p. 133, as to interrogating in detail.

Reference may also be made to a passage in Lord Eldon's judgment in *Farquharson v. Balfour*, T. & R. p. 204, where he points out that the plaintiff must be satisfied with what the conscience of the defendant would allow him to swear, for that the court could give him no more, it could not on the question of insufficiency try whether it was true or not: and see also Lord Hatherley's observations cited *ante*, p. 86: and see *post*, p. 146.

In *Newton v. Dimes*, 3 Jur. N. S. 583, Wood, V. C. would not allow a party to say he had no recollection or belief as to

matters which must have been within his own knowledge or as to his own acts which occurred four years previously.

In *Hall v. Bodley*, 1 Vern. 470 it was held sufficient where the defendant said that he received no more than such a sum to his remembrance.

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(2) *In particular as to his Recollection of the Contents of Documents.*

It is not possible to lay down any definite propositions in connection with the subject.

It is clear that the rigid rule obtaining at common law,\* under which interrogatories enquiring into the contents of written documents were altogether inadmissible, unless they were lost, no longer obtains: it is not clear that the chancery practice on the subject of setting out the contents of documents is to be applied indiscriminately and universally (see *ante*, pp. 6, 7, generally as to conflicting rules of law and equity): it is not clear what the chancery practice was or would have been on the exact point.

The chancery practice on the subject generally of setting out the contents of documents is considered *post*, p. 132.

In some cases where the document is referred to in the opponent's pleading (or perhaps in an affidavit) and is in his possession inspection can before answering be obtained under Ord. XXXI. rr. 15—18, or at all events the opponent will be prevented from using it in evidence if he refuses inspection: see

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\* At common law interrogatories asking for the contents of written documents were altogether inadmissible: Arch. Pr. p. 1149: Lush, Pr. p. 855—856: *Herschfield v. Clark*, 11 Ex. 712: *Rew v. Hutchins*, 10 C. B. N. S. 829: unless they were lost, or at all events unless a *prima facie* case was made out of their being lost, in which case secondary evidence would be admissible: *Wolverhampton, &c. Co. v. Hawksford*, 28 L. J. C. P. 198, where under such circumstances the party was ordered to answer whether he executed a contract, the answer not to be used unless the loss was satisfactorily proved at the trial.

In *Rew v. Hutchins*, the dates of certain correspondence between the plaintiff and other persons, the places and persons were ordered to be given, but not the contents of the correspondence.

Interrogatories were not allowed to contradict a written instrument: *Moor v. Roberts*, 26 L. J. C. P. 246.

*post*, Chap. VI. (qu. whether this is in accordance with the old chancery practice, see *post*, p. 133): and perhaps also where it is not so referred to: see *Dalrymple v. Leslie*, *post*.

It is a legitimate practice for the party to offer documents for his opponent's inspection\* and to interrogate him thereto. And see the old chancery practice, *post*, p. 132.

The only case on the subject since the Jud. Act is *Dalrymple v. Leslie*, 8 Q. B. D. 5: (but see *Lyell v. Kennedy*, cited *post*, p. 392) where the question was discussed at some length. It was an action for libel and the defendant, being asked whether she had written a letter to a third person containing certain defamatory statements, or other statements to the same effect, or what statements, answered that to the best of her recollection and belief she never made those statements in the letter which she admitted she had written, or any of those exact statements, and that she had no copy of the letter and could not recollect with exactness what the statements contained therein were: and it was held by Bowen and Grove, JJ. affirming Lindley, J. that it was sufficient, Bowen, J. at p. 7 considering it to be a question not of discretion but of right. At p. 8 the same judge considered that it was legitimate to obtain admissions through interrogatories as to written documents for the purpose of simplifying proof, but that a party could not be compelled to set out his imperfect recollection of a document not produced for his inspection, which was not suggested to be lost or beyond the jurisdiction of the court, or which for anything that appeared to the contrary might even be in the possession of the interrogating party; that at common law when a party was interrogated as to the contents of an existing written document not in his possession he was allowed to see it before he answered (and so now if referred to in the opponent's pleading and in his possession, see *ante*), and that this rule was not altered by the Jud. Act; and that the passage cited from Dan. Ch. Pr. (see *post*) did not show that

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\* Or to annex a copy of the document to the interrogatories and offer the original for inspection.

in chancery a party could by interrogatories get such secondary evidence without accounting *primâ facie* for the production of the original. In the same case *Grove, J.* considered that in an action of this kind at all events it was sufficient for a defendant to say that he could not recollect with exactness the contents of an alleged libellous letter, for that otherwise he might state the contents to be of a more libellous or a less libellous character, and in either case his statement might be prejudicially used against him, and, in reference to the different practice obtaining in chancery and at common law as to interrogatories enquiring into the contents of written documents, between which it was not necessary then to decide (see as to this *ante*, p. 7), pointed to the distinction which he conceived to exist between the old chancery practice, where, the evidence being documentary, it was necessary there should be stringent powers of getting the truth out, and a common law action, where oral evidence subject to cross-examination was the mode of getting at the truth, and where interrogatories were for the purpose of obtaining admissions to save expense.

In an Irish case *Fitzgibbon v. Greer*, 9 Ir. R. C. L. 294, an action for libel founded on a letter to the Commissioners of the Great Seal, the plaintiff having interrogated as to the contents, it was said "Can you force him to give an account of a document in existence and not forthcoming?"

The chancery practice.

The chancery practice is thus described in *Dan. Ch. Pr.* pp. 305, 306: where a plaintiff wished to obtain from the defendant an admission as to some document in his (the plaintiff's) possession it was formerly usual to leave the document in court and to pray that the defendant might inspect it and then answer: \* but latterly the practice was merely to state in the bill the date of, parties to, and substance of the document relied on by the

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\* A plaintiff might say in his bill that he had left certain instruments in the hands of his clerk in court in order that the defendant might inspect them or according to the more ancient practice he might pray that after inspection the defendant might answer the interrogatories: see Lord Eldon in *Princess of Wales v. Liverpool*, 1 Sw. p. 123: in *Farnsworth v. Yeoman*, 2 Mer. 142, this ancient practice seems to have been followed: so for the purpose of calling upon the defendant to speak to the handwriting: *Taggart v. Hewlett*, 1 Mer. p. 499: *Auriol v. Smith*, 18 Ves. pp. 201, 204.

Lord Langdale in *Shepherd v. Morris*, 1 Beav. p. 179, seems to doubt this practice.



plaintiff, and then interrogate whether a deed of the nature of that set forth was not duly executed by and between the parties stated or some or one and which of them, and whether it did not bear the date and was not to the purport or effect before set out or of some and what other date or to some and what other purport or effect, so as to draw from the defendant either an admission or a denial of the deed and of all knowledge of it or of its execution date and contents, or else a statement of the defendant's knowledge or belief of the parties by whom it was executed, and of its date tenor and effect. And at p. 305 special reference is made to the importance of obtaining admissions of the contents of a deed or agreement or other instrument relied on by the plaintiff which is lost or mislaid.

In *Nelson v. Ponsford* (cited *ante*, p. 129) the defendant was interrogated as to an agreement to grant a lease of which specific performance was being sought, whether it was not in the words or to the effect set out in the bill or what other words or effect, and in particular whether the term was not to commence from the time there mentioned or what other time: the defendant stated that by arrangement the agreement (dated 1835) had been burnt in 1839 (the suit being brought in 1841), and that he was unable to set forth as to his knowledge, &c. whether, &c. Lord Langdale thought it was probable that the defendant knew more than was stated in the answer and that if he were interrogated step by step as to the rent and other particulars he might be able to answer some of those particulars, but as he was only asked generally whether the agreement was not to a particular or what effect the answer was sufficient. See *ante*, p. 129, further commenting on this case, and as to the party's belief.

This case is referred to in the note to *Redes*. Pl. 45 in illustration of the proposition that particular interrogatories may be legitimately put to call matters to the party's remembrance where he might otherwise inadvertently, and not through wilful evasion, state that he was unable to afford information: and see *post*, p. 223: and *ante*, p. 110.

The defendant\* was unable to obtain discovery or production of documents until he had put in a sufficient answer, see *post*, p. 161. In a number of cases, all cited *post*, p. 247 to p. 251, where the plaintiff charged and interrogated as to the nature or contents of or otherwise in reference to particular documents the defendant attempted to get the time for answering extended until after the plaintiff had produced them for his inspection. The applications were on principle generally refused (partly on technical grounds see *post*, p. 248), as being attempts to find out what evidence they had to meet before framing their case. The three cases of *Princess of Wales v. Liverpool*, cited *post*, p. 248: *Taylor v. Hemming*, cited *post*, p. 249: and *Shepherd v. Morris*, cited *post*, p. 249: where the application was successful, were disapproved or at all events only supported on their special and peculiar grounds. No doubt at that period the answer comprised also the defence, and it was mainly perhaps from that point of view that the matter was considered. But considerations of this kind apply in a measure to answering interrogatories. It might be a matter of great importance to a party in framing his answers to know beforehand what could be said on the other side, or what documents his adversary had relating to the question. In *A. G. v. Gaskill*, 20 Ch. D. 519, p. 527 the Court of Appeal on this ground refused to entertain an objection by the defendant that he ought not to be called upon to give his version of what took place at a particular interview in answer to interrogatories until he had seen what account the plaintiff's solicitor gave of it. And see Bk. III. Ch. IX. Sect. 6 as to the priority of right to discovery.

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\* A plaintiff could as a matter of course get an extension of time for answering a cross bill until the defendant had complied with an order for production: see Dan. Ch. Pr. 644: *Holmes v. Baddeley*, 7 Beav. 69 where the order for production was under appeal and where the plaintiff filed an affidavit that inspection was material and necessary for his answer.

But though a defendant had no right in chancery to call for inspection before answering, it seems that where he was unable to put in a proper or sufficient answer to the plaintiff's interrogatories without inspecting certain documents in his possession, he might call on the plaintiff to produce the documents for his inspection; if the plaintiff refused he might allege his inability to give a sufficient answer for this reason, and the plaintiff was then unable to complain of such insufficiency: see *Pickering v. Rigby*, 18 Ves. 484: *Penford v. Nunn*, 5 Sim. 409, cited *post*, p. 247, and p. 249.

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(β) *As to his Information.*

The party is bound to disclose anything of which he has knowledge or information at the time the discovery is sought of him. In addition to this he is bound in respect of certain matters to seek information from documents and from persons.

If as between the party and his opponent the opponent is entitled to an answer to the question he must answer it satisfactorily, or at least show the court that he has done so as far as his means of information will permit: *Taylor v. Rundell*, Cr. & Ph. pp. 111—112. If it is in his power to give the discovery he must give it: if it is not, he must show that he has done his best to procure the means of giving it: *ibid.* p. 113: and see *Inglessi v. Spartali*, 29 Beav. p. 567: *Thomas v. Lethbridge*, 9 Ves. 462: and *post*, p. 220, as to the affidavit of documents.

The question then is what is information in his power, or what are his means of information for this purpose.

(1) As to documents in his possession or power, (2) as to information of agents, (3) as to information of other persons.

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(1) *As to Documents in his Possession or Power.*

He must, if necessary, examine documents in his possession or power.

Where a corporation answered without causing a diligent examination to

be made of all the documents in their possession or power and alleged ignorance of the information required, and afterwards when the documents were inspected the required information was found therein, the court inferred a disposition to obstruct and resist the course of justice, and made them pay the costs of the suit: *A. G. v. Retford*, 2 M. & K. 35.

### *In his Power.*

A party is bound to inspect and answer as to the contents of all documents that are in his possession or power: and all which he has a right to inspect provided he can enforce that right are in his power: *Taylor v. Rundell*, 1 Ph. p. 226. See as to documents, the subject of a covenant for production *Bethell v. Casson*, cited *post*, p. 208.

He is not bound to go and search public books to give information contained therein, although if he has the knowledge he must give it: see *Lyell v. Kennedy*, cited *post*, p. 392, (rate books): and *post*, pp. 142—143.

The distinction may here be pointed out between ordering a party to produce documents in which he has only a partial ownership or no ownership at all, and ordering him to give a list or disclose the contents of such documents, (or produce any copies of them which are in his sole legal possession: see *Hercy v. Ferrers*, *post*, p. 203, as to copies). He cannot be ordered to produce the documents because he is unable to do so; other persons not before the court have a property in them: see *post*, p. 196. But where discovery only is required, the only question being whether as between himself and his opponent the opponent is entitled to an answer, if he is entitled, the party is bound to answer the question satisfactorily or at least show the court that he has done so as far as his means of information will permit, and inasmuch as if he has a right to inspect the documents he has the means of information the court can compel him to exercise that right: see *Taylor v. Rundell*, Cr. & Ph. pp. 111—112: and see *Swanston v. Lishman*, 45 L. T. 36, cited *post*, p. 226, pointing out the distinction: and see also *post*, pp. 206, 305. Further, if whether he has a right of inspection or not, he has any knowledge of their contents at the time he is interrogated he is bound to disclose such knowledge: and see *post*, p. 142.

Where he has a right to inspect the documents not only must he attempt to exercise that right and show that the parties in possession of the documents have refused him access: *Taylor v. Rundell*, 11 Sim. 391: on app. Cr. & Ph. 104; and therefore that there is a physical impossibility to give the access: *Stuart v. Bute*, 11 Sim. 442, pp. 451, 453: but he must take proceedings (and the court will give him time to do so: *Taylor v. Rundell*, Cr. & Ph. p. 113) for the purpose of exercising or vindicating this right, and this is so not only in the case where a party's solicitor wrongfully

refuses him access to his (the client's) documents : *Taylor v. Rundell*, Cr. & Ph. p. 113 : or where his own agent does so : *ibid.* 1 Ph. p. 225 : but whenever documents as to the contents of which he is required to speak are in his custody possession or power and are wrongfully withheld from him : *ibid.* pp. 225—226. It seems therefore that it is not sufficient to say that his attempt to inspect met with such an opposition as amounted to a civil representation that if he persisted force would be used as suggested in *Stuart v. Bute*, 12 Sim. p. 462.

A partner : *Stuart v. Bute*, 11 Sim. p. 452 : 12 Sim. pp. 461—462 : or a director of an association : *Taylor v. Rundell*, 11 Sim. 391, affirmed Cr. & Ph. 104 : 1 Y. & C. C. C. 128, p. 131 : 1 Phill. p. 225 : would under ordinary circumstances have a right to inspect and take copies of the documents of the partnership or association. Where such a person excuses himself from answering interrogatories requiring a list or the contents of such documents on the ground that his co-partners have refused him permission to inspect them it is obviously insufficient, for *primâ facie* no permission is necessary : *Stuart v. Bute*, 11 Sim. p. 452 : 12 Sim. pp. 461—462. There may be some special contract depriving a person of the ordinary rights of a partner : but then he must explain the circumstances : he cannot debar himself from exercising that right by concurring with his partners in giving a direction under which he is not to be at liberty to inspect the documents without their permission, unless it amounts to a contract : *Stuart v. Bute*, 11 Sim. p. 452 : 12 Sim. pp. 461—462. So where a director of an association is refused access by his co-directors : *Taylor v. Rundell*. The facts in the above cited cases of *Stuart v. Bute* and *Taylor v. Rundell* were as follows :—

In *Taylor v. Rundell*, 11 Sim. 491 : affirmed Cr. & Ph. 104, a suit for accounts of working of mines by lessors against lessees, the defendants, being the trustees of these mines for and three of the directors of a mining association, were required to answer interrogatories as to documents in the possession of themselves or their agents, and also, see Cr. & Ph. p. 107, to give discovery as to the working of the mines ; they scheduled documents in the possession of the secretary of the association in England but said they were unable to state what documents there were in the possession of the agent of the association in America, or to give the required discovery, for that the only knowledge they had was contained in the documents of the association,

that these documents were not in their own possession or power in any other sense than that they and their co-directors sitting as a board could order them to be inspected, and that as individuals they had no authority to make use of them except by an order of the board, and that they had no permission from the directors to use them for the purposes of the suit, on the contrary that the directors declined to allow them to use them. The answer was held insufficient by Shadwell, V. C. on the ground that they were bound to apply to the agent abroad for a list of the documents, and by Lord Cottenham (see Cr. & Ph. p. 113) that they were bound to apply to the directors for permission to have access to the documents of the association for the purpose of giving the required discovery.

In a similar suit between the same parties in respect of other mines, a decree had been made, and interrogatories of a similar nature were administered to the defendants. In view of the decision of Lord Cottenham in the other suit they applied to the board to permit them to have access to the documents: the board refused them access and passed a resolution to prevent any of their officers from supplying the required information: an application to the agent in America was also refused: the answer was held insufficient: 1 Y. & C. C. C. 128: for they could not be heard to say, p. 131, that their partners or fellow directors had passed a resolution refusing them access to documents which *primâ facie* should be accessible to them, and they had not shown that they could not inspect them. Finally the matter came before Lord Lyndhurst, 1 Ph. 222, it being admitted that they had done everything they could to get inspection short of filing a bill, and it was held, see *ante*, p. 135, that they must if necessary take proceedings.

In *Stuart v. Bute*, 11 Sim. 442, the defendant, being required to schedule partnership documents and also certain entries therein, scheduled the documents but not the entries, on the ground that he was ignorant of them and had no right to set forth the contents of the books without the consent of his co-partners, and in an answer to another interrogatory he stated that in consequence of an application to the plaintiff he and his co-partners had given directions to their agent who had the custody of the books not to produce them to any person or allow any stranger to inspect them without their authority. The answer was held insufficient on the grounds above (see *ante*) stated, and further that even assuming the consent of the partners necessary he did not say they had refused their consent. The defendant thereupon applied for permission to inspect and take copies and was refused. The Vice Chancellor still held (12 Sim. 460) the answer insufficient on the grounds stated *ante*, namely that he had not shown that any permission was necessary.

Qu. as to the decision in *Martineau v. Cox*, cited *post*, p. 226, as to the absence of any obligation on a partner in England to give discovery of the partnership affairs abroad: and see *post* (2) as to information of agents.

Qu. whether it is sufficient, where partners are interrogated as to the accounts of the business, for one partner to state the result of the accounts (unfavourably to the plaintiff) and the other to state his ignorance but that he had been informed by his partner and believed that the result of the account was as stated by him in his answer, or whether he is bound to look into the accounts himself and give his own view of the result: see *Seeley v. Boehm*, 2 Madd. 176.

In one case the party was ordered to get attested copies of particular entries in a book : *Freeman v. Fairlie*, 3 Mer. 24 : and see a passage in *Swanston v. Lishman*, 45 L. T. 360, referred to *post*, p. 226.

Where he has no right to inspect the documents when the discovery is required of him, he cannot be compelled to give information which he is unable to give without such inspection. Where a defendant, required to schedule a company's documents, at the time of filing the bill was a member of the company, but subsequently before answer transferred his shares and ceased to be a member and was therefore unable to obtain access to the documents and to give a list of them, it was sufficient, for by an act out of court he had divested himself of the power of giving the discovery, he had ceased to be a partner and had no legal means of obtaining the information : *Ellwand v. McDonnell*, 8 Beav. 15, p. 20. But if he has any knowledge of their contents at the time it is so required of him, he cannot refuse to disclose it on the ground that the documents are not his own : see *post*, pp. 142, 305.

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## (2) *As to Information of Agents.*

The knowledge of the agent in the matter of the agency is or ought to be the knowledge of the principal : and it is no answer to discovery to say "all the knowledge is in the possession of my agent" : it is the party's duty to use his best efforts *bonâ fide* to get all the information he can from his agent, and he must write to him if necessary : see James, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, p. 657 (where production was ordered of a letter from the agent giving this information, professional privilege being claimed for it ; see *post*, p. 417) : see also *Hall v. L. & N. W. R. Co.* 35 L. T. pp. 848—849 : and *Lyell v. Kennedy*, 9 App. Cas. p. 85. The knowledge of the agent as to matters which he has done for and on account of the principal, and which are in point of law the acts of the principal himself,

is the knowledge of the principal: see Mellish, L. J. *ibid.* p. 659.\*

In the Court of Chancery, where an act was done by an agent which the principal himself could not have done, the right to require information as to the acts of such agent was beyond all question: Baggallay, L. J. in *Bolckow v. Fisher*, 10 Q. B. D. p. 167. A party is not excused from answering with regard to certain acts by saying that he himself was not present when those acts might have been done but his servants or agents were, if those acts were such as in the ordinary course of business would be done by or be known to his servants or agents: Brett, M. R. *ibid.* p. 169. Where a party is interrogated as to matters done or omitted to be done by his agents and servants in the course of their employment, he does not sufficiently answer by saying that he does not know and that he has no information on the subject. He is bound to go further, and obtain information from such agents or servants of his, or he must show sufficient reason for not doing it: Lindley, L. J. *ibid.* p. 171: and see *Glen-gall v. Fraser*, 2 Ha. pp. 104—105, and p. 103, cited *post*, p. 142.

In *Bolckow v. Fisher*, 10 Q. B. D. 161, an action by cargo owners for loss of cargo against the shipowners, the defendants, being interrogated as to the time at which Portland was sighted, as to the state of the weather the navigation and course of the ship, as to what soundings were taken and other similar matters, answered as to the first two points but as to the rest stated that they had no knowledge or information save as appeared by the protest and other documents which had been inspected by the plaintiffs, and that they had not obtained statements thereon from the officers or crew in charge or on watch at the time; it was held insufficient. The log book in this case was lost.

In *Hall v. L. & N. W. R. Co.* 35 L. T. 848, an action against the company for loss of casks delivered for carriage to them or to two firms of carriers acting as their collecting agents, the company were held bound to answer through their officer as to the delivery to and acceptance by these firms of

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\* The learned judge seems on this page to lose sight of the distinction, pointed out by Cotton, L. J. in *Southwark, &c. Co. v. Quick*, 3 Q. B. D. p. 321, between ordering production of the actual communication from the agent to the principal which might under some circumstances be privileged, see *post*, p. 416, and compelling the party to discover the knowledge which he has acquired therefrom. Nor is *Lyell v. Kennedy*, 9 App. Cas. 81, discussed *post*, p. 362, opposed to this distinction; for the gist of the judgments in that case was that the information being admittedly privileged, the belief founded thereon must be also privileged: here the information is not privileged.



the casks as their agents, for the plaintiff had a right to the information whether acquired through their agents or not.

See also *ante*, p. 75, as to the obligation of a corporate body to disclose the knowledge and information of its agents.

The cases in which a party has been held bound to make an affidavit of documents in his agent's possession (see *post*, pp. 220, 225) apply, for there is no difference in principle between the obligation to state facts in an affidavit of documents and in answer to interrogatories: Lindley, L. J. in *Bolckow v. Fisher*, p. 171; and see *post*, p. 220.

Where a party is required to give information on any matter he is not bound to apply to all his servants and agents for any information they may have on the matter, unless it is a matter done or omitted to be done by them in the course of their employment: *Bolckow v. Fisher*, p. 171, or was an act such as would in the ordinary course of business be done by or known (not merely accidentally) to them, or done in their presence: *ibid.* p. 169; and such matter or act was admittedly or obviously so done or omitted to be done or known: see *Rasbotham v. Shropshire, &c. Co.*: and *A. G. v. Rees*, *post*; or unless the party is specially interrogated as to its being so done or omitted to be done or known by his servants or agents generally, or as to the knowledge of some particular servant or agent upon the matter: see *McIntosh v. G. W. R. Co.*: *Rasbotham v. Shropshire, &c. Co.*: *Glengall v. Fraser*: *A. G. v. Rees*: and *Neate v. Marlboro*, *post*: and see *Jones v. London Road Car Co.* cited *ante*, p. 93, where leave was given to interrogate as to verbal reports from the agents of the company.

In *Rasbotham v. Shropshire, &c. Co.* 24 Ch. D. 110, an action by the owners and tenant of a mill for wrongfully diminishing the water flowing down a river, the plaintiffs were required to give a list of the days on which the working of the mills was so interfered with, to describe the nature and cause of the interference and the negligent acts of the defendants causing such interference: the tenant in answer said (*inter alia*) that he was unable to specify the particular days. North, J. held the answer sufficient, for that it was not necessary for him to say that he had made inquiry of the persons in his employment, not being interrogated as to that, nor was there anything to show that the acts were done in their presence.

See a case of *Berry v. Keen*, cited *ante*, p. 42, where it was not suggested that the defendants were bound to get this information from their solicitors, for it was information acquired by them when acting for another person.

In *A. G. v. Rees*, 12 Beav. 50, the defendants, partners in a colliery company, being asked as to the working of the mines answered that they did not know and could not set forth as to their belief or otherwise, not using the word "information"; the answer was held insufficient for they must have had workmen or agents from whom they could have got the information, and therefore the means of obtaining the information would necessarily

be presumed to be within their knowledge, though in some cases (citing *Glengall v. Frazer*, *post*, *Taylor v. Rundell*, *ante*, p. 136) the interrogating party should indicate the means.

See also *Gort v. Rowney*, *post*, p. 364.

Where a bill states a fact not denied by the answer whereby it appears that the defendant has the means of answering as to his belief by making inquiry, his stating that he is unable to set forth, &c. is not sufficient: he ought to make such an answer as may be sufficient to have the cause heard on bill and answer: the plaintiff ought not to be driven to go into evidence: *Neate v. Marlboro*, 2 Y. & C. p. 4, where to an interrogatory founded on a charge that a bond had been prepared by his attorney he had answered that he was unable to set forth, &c.

Qu. whether it is sufficient for the party to say that he is unable to give the required information, that is to say, whether it will be assumed that he has made such inquiries as he is bound to make of his servants and agents: see the cases *ante*: and see also *McIntosh v. G. W. R. Co.* cited *ante*, p. 75, where it was said that the court must be informed that the company had taken the means of acquiring the information from the agent.

In some cases there may be a difficulty in distinguishing between the material facts whether they did or did not happen, discovery of which must be given, and the evidence of those facts on which they have to show whether those facts did or did not exist: see Brett, M. R. in *Bolckow v. Fisher*, 10 Q. B. D. p. 170: and see also Mellish, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. pp. 658—659: and *Grumbrecht v. Parry*, cited *post*, p. 459.

That the information which they have obtained of those facts has been obtained in the course of collecting evidence creates no privilege, assuming that it is information which they are bound to give: see *post*, p. 364, referring to *Pavitt v. North Metropolitan Tramways Co.*

The principle that the principal must give his agent's knowledge in the matter of the agency seems to have been lost sight of in a common law case of *Phillips v. Routh*, L. R. 7 C. P. 287. There, the action being brought in respect of alleged negligence in purchasing certain goods, the defendant was interrogated concerning matters connected with the purchase and professed his ignorance. Subsequently he corresponded with his partner who had carried out the transaction of purchase. Being then interrogated a second time, he was held to be justified in refusing to answer on the ground that his knowledge was derived from these communications and that the case was within *Chartered Bank of India v. Rich*, the communications being for the purpose of his defence. It is clear that it was his duty in the first instance to have got the information from his partner; and further, even if

the documents could have been brought within the privilege, the information which they gave could not be withheld in answer to interrogatories: see Cotton, L. J. in *Southwark Water Co. v. Quick*, cited *ante*, p. 139, n. This case (and also *Bechervaise v. G. W. R. Co.* referred to *ante*, p. 81) was cited in *Bolckow v. Fisher*, *ante*, p. 139, but apparently disregarded.

It is of course important to get these facts as admissions from the party to save the expense of procuring evidence; and for that reason alone it is no answer to say that the opponent could himself get the information from the servant or agent or otherwise: see *Glengall v. Frazer*, 2 Ha. pp. 104—105: *Bolckow v. Fisher*, 10 Q. B. D. p. 171: *Neate v. Marlboro*, 2 Y. & C. p. 4.

As to the objection of expense and undue detail suggested by Brett, M. R. in *Bolckow v. Fisher*, p. 170, see *post*, p. 298.

As to past agents.

Where the person who was his agent or servant at the time is no longer so, or no longer under his control, or in such a position that it would not be reasonable to force the party to communicate with him: Brett, M. R. *Bolckow v. Fisher*, p. 169: or if he is dead or at some place where he cannot be got at: Lindley, L. J. *ibid.* p. 171: the party will be relieved from his obligation.

In *McIntosh v. G. W. R. Co.* 4 D. G. & Sm. 503, the defendants being interrogated as to the possession of any and what documents (relating to transactions fourteen years previously) by any and what persons formerly but not then their agents, it was held sufficient to state their ignorance in the ordinary form. But it might be otherwise if any particular agent or document were specified: *ibid.* In *Glengall v. Frazer*, 2 Ha. 99, the defendant being asked as to communications between D. his late solicitor and acting as such, and the plaintiff and other persons, it was held that he must ascertain or at least attempt to ascertain the facts from D. though they occurred seventeen years ago and D. had ceased to be his solicitor for seven years: and see *ante*, p. 139. As to interrogating past officers of a corporate body, *ante*, p. 75.

And see *Hall v. L. & N. W. R. Co.* *ante*, p. 139, as to temporary agents.

### (3) *The Information of other Persons.*

There is no obligation on a party to apply for information to persons who are not or have not been his agents: though if he has the knowledge at the time he is interrogated he must give it: and see *ante*, pp. 134, 135, 138.

A party is not bound in all cases to seek information which is equally accessible to both parties and which is not either in his own possession or knowledge or that of his agents or of

persons within his own control or for whose acts with reference to the matters in question he is answerable: not for instance to go and search parish registers in order to answer a question as to the death of some person: *Glengall v. Fraser*, 2 Ha. p. 103: and see *ante*, p. 135.

A defendant with regard to transactions that are not his own is not bound to find out information for the purpose of communicating it to the plaintiff: *Christian v. Taylor*, 11 Sim. p. 405. In this case the plaintiff as executor of C. sought to set aside an assignment by him of a business carried on in partnership with J. T. to J. T. and W. T. the defendants being W. T. and the executor of J. T. and the interrogatories inquiring into the business accounts of the partnership between C. and J. T. It was held that the defendants were under no obligation to go through the books and that it was sufficient to offer inspection (as to which see *ante*, p. 123).

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VII. *As to the Time within which the Interrogatories must be Answered.*

Interrogatories shall be answered by affidavit (see as to answering on oath, Bk. III. Chap. IX. Sect. 2), to be filed within ten days or within such other time as a judge may allow: Ord. XXXI. r. 8. But by rule 26 (Bk. III. Chap. VIII. Sect. 2), the time for answering, where deposit for security for costs is necessary, see *post ibid.* runs from the date of service of a copy of the receipt for such deposit: whether the copy be served with the interrogatories, or afterwards: *Jones v Jones*, W. N. 84, p. 17.

By Ord. LXIV. r. 8, the time for filing an answer or any other document may be enlarged by consent in writing.

By Ord. LXIV. r. 7, the judge has power to enlarge or abridge the time.

See as to the costs of applications for extension of time Ord. LXV. r. 27 (24).\*

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\* The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the court or judge shall

See also *post*, p. 146, referring to *Lyell v. Kennedy*.

In chancery the time for putting in the answer (which however comprised the defence) would be extended on very slight grounds.

By Consol. Ord. XXXVII. r. 8, where a defendant using due diligence was unable to put in his answer within the time allowed, the judge, on sufficient cause being shown, might as often as he should deem right allow such further time and on such terms if any as to the judge should seem just. Though even the first application was not of course and must be supported by affidavit to the above effect: *Brown v. Lee*, 11 Beav. 162; (but the practice was usually to grant it without affidavit the first time: Dan. Ch. Pr. 642): time would be allowed on very slight grounds: *Read v. Barton*, 3 K. & J. p. 167: the statement of counsel in court would generally be accepted: *Byng v. Clark*, 13 Beav. 92, where after four extensions of time had been allowed, a further extension was granted on the statement of counsel that he required further time to prepare the answer, which was a long and complicated one.

But it was only granted on the understanding that a bonâ fide answer would be put in; and where therefore after an extension of time had been granted the party filed a document saying that he could not put in an answer as he had sent for information abroad and could not get it, it was taken off the file: *Financial, &c. Co. v. Bristol, &c. Co.* L. R. 3 Eq. 422. So in *Read v. Burton*, 3 K. & J. 166, an answer answering only one interrogatory after repeated extensions of time, and obviously put in to gain time, was taken off the file: so in *Johnson v. Bovill*, W. N. 69, p. 15, where ultimately an answer was put in denying all knowledge.

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have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided. The costs of a summons to extend time shall not be allowed in cases to which Rule 8 of Ord. LXIV. applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment or deal with such costs in the manner provided by Regulation 21.

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VIII. *As to the Form of the Affidavit in Answer to Interrogatories—As to Printing it.*

An affidavit in answer to interrogatories shall unless otherwise ordered by a judge, if exceeding 10 folios, be printed, and shall be in the Form 7 in Appendix B. (see *post*, App. Ch. I.) with such variations as circumstances may require: Ord. XXXI. r. 9.

The judge can dispense with the whole affidavit being printed, though *qu.* whether he can dispense with a part only being printed: *Webb v. Bomford*, 46 L. J. Ch. 288 : 25 W. R. 251.

A schedule therefore must unless a special order be obtained be printed; but it might be made an exhibit: *ibid.* See also *ante*, p. 125, as to schedules.

IX. *As to the Mode of obtaining a Further Answer where a Previous Answer is insufficient.*

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons: Ord. XXXI. r. 10.

If any person interrogated omits to answer or answers insufficiently the party interrogating may apply to the court or a judge for an order requiring him to answer or to answer further as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by *vivâ voce* examination as the judge may direct: Ord. XXXI. r. 11.

In an Irish case *Lloyd v. Morley*, 5 L. R. Ir. Ch. 74, it was considered that the time within which a party should apply under this rule for a further answer should be six weeks, by analogy to the old chancery practice of exceptions.

The party objecting to the answers should specify in his summons the answers (by their numbers *Ashley v. Taylor*, 38 L. T. 44) which he considers to be insufficient: *Ashley v.*

*Taylor*: or the interrogatories or parts of them to which he requires a further answer: *Anstey v. North Woolwich, &c. Co.* 11 Ch. D. 39: *Chesterfield, &c. Co. v. Black*, 24 W. R. 783: in order that his opponent may know what is complained of: *Ashley v. Taylor*.

But where the complaint is not that the opponent has failed sufficiently to answer any particular questions but that the whole answer is an evasion and attempt to baffle him, he may take out a summons for this purpose: *Furber v. King*, 29 W. R. 536: 50 L. J. Ch. 496, where on this ground Bacon, V.-C. ordered the answer to be struck out and a full and sufficient answer to be delivered in a fortnight: and see *ante*, p. 121.

The court has power to make merely a declaration that the answer is insufficient, and leave the party exposed to the penalties attaching to default in giving discovery (see *post*, p. 583), but this will only be done in extreme cases: the ordinary course is to order a further answer, on the assumption that the party will ask for further time, and to give him that time: see Cotton, L. J. in *Lyell v. Kennedy* (cited *post*, p. 392): and *post*, pp. 584, 588.

The only question which the court has to consider under rule 11 is whether the answer is insufficient, not its truthfulness: that is to say whether the party has answered that which he is required to answer and which he has no excuse for not answering: see Cotton, L. J. *ibid.*: and *ante*, p. 109.

It may be pointed out that the mere fact that the last answer or the oral examination is inconsistent with a previous answer does not necessarily make it insufficient. If at the time of the answer or examination the party's attention is called to the inconsistency of his present statement with his former statement and he affirms the correctness of the present and the incorrectness of the former, the matter cannot be carried any further: and where two previous inconsistent answers have been put in the present statement if consistent with the one must be inconsistent with the other. The adversary must be satisfied with what the party's conscience allows him to swear: the court cannot on the question of insufficiency try the truth of what he says: see Lord Eldon in *Farquharson v. Balfour*, T. & R. pp. 203—204: and see further *post*, p. 211, as to the sufficiency of an affidavit of documents: and *ante*, p. 129.

#### *Vivâ voce Examination.*

The only reported case under this rule is a case of *Vicary v. G. N. R. Co.* 9 Q. B. D. 168, where a master, having ordered



a *vivâ voce* examination of the plaintiff before a special examiner, ordered at the same time that the costs of and occasioned by the application and order (that is to say including the costs of the examination) should be the defendant's costs in any case: this order as to costs was held to be within his jurisdiction, though as a rule it was considered that the costs should be reserved, otherwise there was a risk of making the examination unduly protracted. See the form of order in Chitty, p. 296.

Qu. as to the questions which may be put: see *post* as to the common law practice on this point: *post*, p. 148, as to the chancery practice: and *post*, p. 571, as to the oral examination of a judgment debtor under Ord. XLII. r. 32. See also the form of order in Chitty, p. 296.

As to the attendance of counsel, see *post*, p. 148, as to the common law practice: and *post*, p. 148, as to the chancery practice.

#### The common law practice.

By sect. 53 of the C. L. P. Act, 1854, it was provided as follows:—"In case of omission without just cause to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party as to such points as they or he may direct before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application and of the proceedings thereon, and otherwise as to such court or judge shall seem just." And by sect. 54 it was provided that such rule or order should have the same force and effect and might be proceeded upon in like manner as an order made under 1 Will. 4, c. 22. Section 55 provided for the keeping of the depositions, and for office copies: section 56 for reports to the court touching the examination and the conduct or absence of the witness or other persons and for the institution of proceedings relating thereto if necessary. Section 57 provided that the costs of the application, and the rule or order and proceedings thereon should be in the discretion of the court or judge making the order or rule.

It may be noted that "on omitting without just cause sufficiently to answer" the party was also deemed to have committed a contempt of court under section 51: see as to attachment *post*, p. 584.

This power of ordering a *vivâ voce* examination must have been exercised with caution and with a due regard to the nature and circumstances of the action: must in special cases be supported by affidavit: and the order was *nisi* in the first instance: *Swift v. Nunn*, 26 L. J. Ex. 365: and see Day, C. L. P. 311. Application must have been made promptly, *Chester v. Wortley*, 18 C. B. 239: it would be directed instead of attachment where there was no contumacy: *Turk v. Syme*, 27 L. J. Ex. 54.

The order for oral examination did not necessarily specify the particular

points to which the examination was to be directed: the matter being left to be dealt with by the master when the case came before him: *Peyton v. Harting*, L. R. 9 C. P. 9: and see the form of order in Ch. Archb. p. 296. From the report of this case in 43 L. J. C. P. p. 13, it appears that the examination which was there directed (on account of the answers containing matter of supererogation see *ante*, p. 117), only those questions contained in the interrogatories were allowed to be asked except in one instance where the answer was not sufficiently precise, and when other questions were allowed in order to obtain an explicit statement. The recommendation of the C. L. P. Commission (2nd report, pp. 36—37) was as follows:—each party when under examination to be confined to answering questions propounded by his adversary with such explanations as are necessary to prevent a categorical answer from being the means of misleading, it being optional for the interrogating party whether to use the answers or not as in case of a bill of discovery.

Counsel was allowed to attend on behalf of the interrogated party in *Peyton v. Harting*: see 43 L. J. C. P. p. 13.

### The chancery practice.

The chancery practice was regulated by Consolidated Order XVI. r. 19, under which (in accordance with the earlier practice) where a third answer was held to be insufficient the court might order the defendant to be examined on interrogatories to the points as to which it was held insufficient and to stand committed until he should have perfectly answered the interrogatories, the defendant to pay such costs as the court should think fit to award: (this did not apply to affidavits of documents: *Harford v. Lloyd*, 2 W. R. 537). See as to committal *post*, p. 585.

After a third insufficient answer a fourth insufficient answer (not an affidavit of documents *ante*) would be ordered to be taken off the file: *Liverpool v. Chippendale*, 14 Jur. 301, pointing out Lord Eldon's misunderstanding of the practice in *Farquharson v. Balfour*, T. & R. 184, where the examination was deferred until after a fourth insufficient answer.

The questions to be put on the examination were not confined to the interrogatories, but were drawn by counsel and settled by the judge (formerly the master). They must go directly to the points to which the exceptions were sustained: *Farquharson v. Balfour*, p. 193: but any question might be put which the master thought might fairly arise out of the matter contained in the answers to avoid the necessity of amending the bill: *ibid.* p. 202: but no fresh questions could be put after the master had settled them: *ibid.* p. 198: but see *post*. In this case the questions required more minute and particular discovery than the interrogatories: *ibid.* p. 193. The practice was (following out Lord Eldon's suggestion in *Farquharson v. Balfour*, p. 198) to the following effect: When the interrogatories were settled, a copy was left by the plaintiff at chambers, notice thereof given to the defendant: the latter procured a copy, prepared a written answer, obtained an appointment at chambers, was examined on oath by the judge who would determine the sufficiency of the answer, and where in any respect it was insufficient, would personally examine the defendant until the examination was sufficient: see Dan. Ch. Pr. pp. 673—674: *Hayward v. Hayward*, Kay, Appx. p. xxxv.: *Danell v. Page*: and *Rishton v. Grissel*, *post*.

Counsel on behalf of the defendant was allowed to be present during the examination: *ibid.* p. 197: but the plaintiff was not entitled to notice of the defendant's being under examination and had no right to attend; the defendant was not entitled to his discharge out of custody until the plaintiff had had an opportunity of perusing the examination in order that he might be satisfied that it was sufficient: see Dan. Ch. Pr. 674, referring to *Farquharson v. Balfour* and *Hayward v. Hayward*.

In *Rishton v. Grissel*, 14 W. R. 789, where an interrogatory had not been

fully traversed it was suggested that the defendant should be examined at chambers and the matter would be at once cleared up.

In *Danell v. Page*, 18 L. T. 785: 16 W. R. 1080, after a third insufficient answer it was arranged that the defendant should attend personally before the examiner to be *vivâ voce* cross-examined by counsel on behalf of the plaintiff.

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*X. As to Delivering more than one set of Interrogatories or Amending them.*

No party shall deliver more than one set of interrogatories to the same party without an order for that purpose: see Ord. XXXI. r. 1, *ante*, p. 91.

Leave was or would have been granted in *Swire v. Redman*, cited *ante*, p. 96. Further interrogatories were allowed in an Irish case where the opponent had misunderstood an interrogatory: *Thompson v. Wynne*, 1 I. R. C. L. 600: see also *ante*, pp. 104, 110. In chancery there was no difficulty in getting leave to amend the bill merely for the purpose of interrogating. And a defendant would be allowed to amend his concise statement for the purpose of founding thereon further interrogatories if it was important for the purpose of making out his case, it not being necessary for him to say that he had discovered new matter: *Crossley v. Dixon*, L. R. 6 Eq. 332, p. 334.

Liberty to amend interrogatories which were too widely drawn was given in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* 28 Sol. J. p. 410: and see *Swire v. Redman*, cited *ante*, p. 96: and *ante*, pp. 103—104, 108, 122.

Qu. whether alterations in or additions to interrogatories may be made without an order if they have not been yet answered.

In chancery they might be amended (they were filed in chancery) by an order of course at any time before the answer was put in: Braithw. Pr. 309: or it seems before a further answer, after exceptions allowed, was put in: see *Newry v. Kilmorey*, L. R. 11 Eq. 425 (where the bill also was amended and the amended interrogatories embraced most of the original ones). The full time for answering ran from the service of the amended interrogatories: Dan. Ch. Pr. 410.

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# XI. *As to Amending an Answer or Filing a Supplemental Answer.*

As a matter of indulgence to the interrogated party. See *Gay v. Labouchere* and *Saunders v. Jones*, *post*, p. 452, as to amending answers in the same way as particulars.

In chancery a party would be allowed to amend his answer in cases of error or mistake in matters of form: Dan. Ch. Pr. 683: or to file a supplemental answer to correct a mistake as to a matter of fact, or where he was ignorant of a particular circumstance at the time of putting in his answer: *ibid.* 680; but the court did so with great difficulty where the addition or correction was prejudicial to the plaintiff, though more readily where it would be in his favour: *Edwards v. Macleay*, 2 V. & B. 256: but see *Wells v. Wood*, 10 Ves. 401, where the defendant desired to make an admission in favour of the plaintiff, and it was said that the affidavit ought to state that at the time of putting in his answer he did not know the circumstances on which he made the application or any other circumstances upon which he ought to have stated the fact otherwise: and see generally Dan. Ch. Pr. pp. 681—684.

In many of the cases it was sought to make the addition to or correction of the answer rather by way of defence than by way of answer to interrogatories. The following are the cases which seem to turn on the latter function of the answer: *Edwards v. Macleay*, 2 V. & B. 256—no recollection of a certain entry at the time—since discovered it: *Strange v. Collins*, *ibid.* 163—denial of having acted as administrator—since discovered he had acted: *Phelps v. Prothero*, 2 D. G. & Sm. 274—to correct denial of commission of certain acts by his agents, having been incorrectly informed: *Frankland v. Overend*, 9 Sim. 365—to admit a circumstance which he had denied, having since learnt it: *Livesey v. Wilson*, 1 V. & B. 149: *Wells v. Wood*, 10 Ves. 401, see *ante*: *Greenwood v. Atkinson*, 4 Sim. 54, commenting on earlier cases: *Bell v. Dunmore*, 7 Beav. 283—to correct unintentional mistake of date: *Churton v. Frewen*, L. R. 1 Eq. 238—to correct an admission in the defendant's own favour.

Qu. as to any obligation on the party to amend his answer or file a supplemental answer for the purpose of giving information discovered since putting in the answer or otherwise in favour of his opponent.

## CHAPTER V.

## DISCOVERY AND PRODUCTION OF DOCUMENTS GENERALLY.

DISCOVERY and production of documents is subject to the same general principles as discovery by interrogatories. In fact in chancery the production of a document was a substitute for the ancient practice of setting out its contents in the answer, and was therefore a part of the answer and necessary to complete its fullness, and the right to production was tested in the same way (but see *ante*, p. 31) as the right to have its contents set out: see Lord Langdale in *Storey v. Lennox*, 1 Keen, p. 350: Wigr. Pl. 285: *Unsworth v. Woodcock*, 3 Mad. 432: the affidavit of documents is in reality an answer to an imaginary interrogatory: see *post*, p. 220.

The exercise of a jurisdiction of this nature is far more open to abuse than that of enforcing discovery by means of interrogatories. In the latter case each question can be checked; but the mischief of producing a document cannot be seen until it is produced when it is too late: see Wigr. pl. 5. The court would order a direct question to be answered the answer to which the court would be less ready to allow a party to seek by ransacking his opponent's papers: *A. G. v. Thompson*, 8 Ha. p. 116. And it is for reasons of this nature that the court is willing to accept under certain limitations the party's own statement as to the nature and effect of documents in his possession, though such statements may sometimes involve matter of law as well as of fact: see Wigr. pl. 317: and Hare, pp. 232—233. Production by way of discovery is a very different thing to production at the trial: for in the latter case there is no opportunity for the opponent to make copies: see Wigr. pl. 396.

I. *General Observations on the Scheme of the Rules dealing specially with Discovery and Production of Documents, namely, Ord. XXXI. rr. 12—18.*

Rule 14 (being the same as rule 11 of the old rules except as to the omission of “therein,” as to which see *post*, p. 606, and the substitution of “cause or matter” for “action or proceeding,” as to which see *post*, Bk. III. Ch. V.) is that which now governs the practice both in the common law and equity divisions: see Jessel, M. R. in *Bustros v. White*, 1 Q. B. D. pp. 425—426: Mellish, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 658: and see *Re National Funds, &c. Co.* *post*, p. 296.

“It shall be lawful for the court or a judge at any time during the pendency of any cause or matter to order the production by any party thereto upon oath of such of the documents in his possession or power relating to any matter in question in such cause or matter as the court or a judge shall think right: and the court may deal with such documents when produced in such manner as shall appear just.” Rule 14.

Although it differs very little from a similar provision in the C. L. P. Act, 1854 (section 50, see *post*, App. Ch. II.): Mellish, L. J. in *Anderson v. Bank of British Columbia*, p. 658; it is in fact copied from (although in a somewhat different form), and will receive the same interpretation as section 18 (and section 20: see these sections *post*, App. Ch. II.) of the Chancery Procedure Act, 15 & 16 Vict. c. 86, which settled the practice in chancery from that date down to the coming into force of the Jud. Act, and which in fact made no alteration in the rules previously existing in chancery as regards the right to the production of documents: see Jessel, M. R. in *Bustros v. White*, 1 Q. B. D. p. 426.

There is no discretionary power under this rule to refuse the production of relevant (that is to say relevant to a matter immediately in question: see *ante*, pp. 11, 12) documents which do not fall within the established rule of privilege or protection obtaining in chancery (see these rules *post*, Bk. II.); for there was no such discretionary power before the Ch. P. Act, and none such under the act, and further “where there is any conflict or variance between the rules of equity and

the rules of the common law with reference to the same matter the rules of equity shall prevail" (Jud. Act, sect. 25, sub-s. 11): see Jessel, M. R. in *Bustros v. White*, p. 426: and in *Anderson v. Bank of British Columbia*, p. 654: and James, L. J. *ibid.* p. 656: the common law practice therefore under which the judges were accustomed to use a very wide discretion in exercising the powers of ordering production of documents conferred upon them by the C. L. P. Acts (see the sections *post*, App. Ch. II.) no longer obtaining, and the authorities thereunder (for instance *Chartered Bank of India v. Rich*, cited *post*, p. 512) being no authorities for the present practice in this respect: *ibid.*

An application for an order under this rule may be made where no provision is made under the other rules: see a particular instance, *post*, p. 154: and see *Re National Funds, &c. Co.* *post*, p. 296.

See as to what are documents "relating to any matter in question," *post*, Sect. VIII. (b).

See as to what are documents "in his possession or power" for the purpose of production, *post*, Sect. IX.

It was a fundamental principle in chancery that a party could not be ordered to produce a document unless he had (in his answer originally) directly or indirectly admitted it to be in his possession and to be relevant: Dan. Ch. Pr. 1686—1687: Lord Langdale in *Storey v. Lennox*, 1 Keen, p. 350: Lord Cottenham, *ibid.* 1 M. & C. pp. 534—535: *Barnett v. Noble*, 1 Y. & W. 228: *Reynell v. Sprye*, 1 D. G. M. & G. 656: *Lamb v. Orton*, 1 Dr. 414: *Wing v. Harrey*, 1 Sm. & G. App. 10: Lord Hatherley in *Mansell v. Feeney*, 2 J. & H. p. 324: see *post*, Sect. X. sub-sect. (a), and *post*, p. 180, as to the conclusiveness of the party's assertion of irrelevancy: and see *post*, p. 191, as to the reason for requiring an admission of possession. Evidence could not be given to prove possession: *Addis v. Campbell*, 1 Beav. p. 201: *Reynell v. Sprye*: *Lamb v. Orton*: and see *post*, p. 191. There is nothing in the Jud. Act or Rules to break in upon this principle: (see as to the practice where notice is given to inspect documents referred to in the pleadings under Rule 15, *post*, p. 245).



By rules 15—18 the machinery is provided for obtaining inspection of documents to which the other party has made reference in his pleadings or affidavits: see these rules discussed at length *post*, Ch. VI. In the common law division inspection of documents disclosed in the affidavit of documents is obtained in this way: see *post*, App. Ch. I., as to the form of order for the affidavit, and *post*, App. Ch. I., as to the form of order for inspection. In the Chancery Division, in spite of the form given by the R. S. C. (April, 1880), the order directing the affidavit of documents at the same time orders production of the documents which the party does not therein object to produce in accordance with the old chancery practice and as being permissible under rule 14, *ante*: see *post*, App. Ch. I: this order was called the common order for discovery or production.

By the latter part of rule 18 in case of documents not referred to in the pleadings or affidavits of the other party or disclosed in his affidavit of documents an application for an order for inspection may be made founded upon an affidavit\* showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. But in accordance with the principle referred to *ante*, it is conceived that the party against whom the application is made may file an

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\* The nature of the affidavit required on an application at common law for inspection under sect. 6 of the Act of 1851 was laid down in *Hunt v. Hewitt*, 7 Exch. pp. 243—244, being apparently of the same kind as that in use on an application under the common law equitable jurisdiction, see *post*, p. 269. It must have stated that an action or other proceeding was pending, its nature and the question to be tried, that the party had just ground to maintain or defend it, circumstances sufficient to satisfy the judge that there were documents in the opponent's possession or control, that they related to the action or proceeding, the reason of the application and the nature of the documents, that it might appear that they were asked for for the purpose of enabling the applicant to support his case not to find a flaw in his opponent's case, and also in order that the opponent might admit or deny possession; and the affidavit of the opponent might deny possession or claim protection for them as relating exclusively to his case or on other grounds, or he might submit to show parts covering up the remainder on an affidavit that it did not relate to the opponent's case: *Hunt v. Hewitt*: see also *Pepper v. Chambers*, *ibid.* 226: *Hill v. Philp*, *ibid.* 232: Day, C. L. P. 302, 303. The affidavit in use under the present practice merely follows out the terms of the rule: see Ch. F. p. 280: Dan. Ch. F. 1737.

affidavit in reply denying that they are in his possession or power or that they are relevant, and that such denial is conclusive, and generally that the same credit would be given to his statements therein whether in that respect or as to relevancy or as to privilege of any kind as in answers to interrogatories or an affidavit of documents, though it seems to have been otherwise at common law : see *London Gas Light Co. v. Chelsea*, 6 C. B. N. S. pp. 425—426. An application under this rule was made in *Mattock v. Heath*, W. N. 75, p. 201, an action of ejectment, for inspection of a document which, it was stated, appeared from the defendant's bill of costs to be in his possession, being private memoranda relating to a pedigree made by him for his own use : the application was refused on the ground of the nature of the document : but *qu.* see *post*, p. 389.

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By rules 12 and 13 an order may be obtained for what is called an affidavit of documents.

Rule 12. Any party may without filing an affidavit (see *post* (b)) apply to the court or a judge for an order directing any other party (see *ante*, p. 68) to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On (see *post* (c)) the hearing of such application the court or judge may either refuse (see *post* (a)) or adjourn (see *post* (c)) the same if satisfied that such discovery is not necessary or not necessary at that stage of the cause or matter, or make such order either generally or limited (see *post* (c)) to certain classes of documents as may in their or his discretion be thought fit. Rule 13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made shall specify which if any of the documents therein mentioned he objects to produce and it shall be in the Form 8 in App. B. (see *post*, p. 221) with such variations as circumstances may require.

See as to the affidavit of documents *post*, Section X. in detail.

See *ante*, p. 154, as to the order in the chancery division including also an order for production : in contradistinction to the order in use in the common law division.

Discovery and production of documents was originally obtained in chancery by means of interrogatories. They were either so framed as to compel the party to set forth the short contents of the documents in his answer (and if necessary the court would also order their production), or by means of a general charge of possession of documents from

which the truth of the allegations in the bill would appear or relating to the matters contained in the bill, or by a special charge of possession of particular documents such an admission was obtained as that an order for production could be founded thereon: see Dan. Ch. Pr. p. 1674: *Mansell v. Feeney*, 2 J. & H. p. 318: *Atkins v. Wright*, 14 Ves. 211. By the Ch. P. Act, sections 18 and 20 (see *post*, App. Ch. II.), and orders made thereunder, the affidavit of documents was introduced: see *Rochdale v. King*, 15 Beav. 11.

The affidavit was introduced at common law by section 50 of the C. L. P. Act, 1854 (see the section, *post*, App. Ch. II.), the power of ordering inspection of particular documents having been already conferred upon the common law courts by section 6 of 14 & 15 Vict. c. 99 (see the section, App. Ch. II.): inspection of the documents disclosed in the affidavit of documents was ordered subsequently by virtue of one or other of these sections: see *Republic of Peru v. Weguelin*, L. R. 7 C. P. 352: *Hill v. Campbell*, L. R. 10 C. P. 222.

(a)

The court has under this rule 12 (not in express terms under rule 12 of the old rules, see *post* (c)) a discretion to refuse the application altogether if satisfied that the discovery is not necessary. But it is conceived that as under the old rule, see for instance W. N. 75, pp. 231, 238, 249: W. N. 76, pp. 24, 53, 64: and *post*, p. 162, referring to the practice of Jessel, M. R.: and as in chancery, see *Rumbold v. Forteath*, 3 K. & J. p. 47: an order either general or limited (see *post* (c)) will be\* practically a matter of course (see further *post* (b)), unless the stage of the action is improper, as to which see *post*, Sect. II. It may be that every document in his posses-

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\* But in *Jacobs v. G. W. R. Co.* W. N. 84, p. 34, Mathew, J. considered that the object of the rule requiring an order was to enable the judge to exercise a discretion to see what the object of the discovery is and whether there is any real need for it, that the object of the new rules was to restrict discovery, and that the power of compelling disclosure of documents as of course was one of the most oppressive things in the practice before (qu.) the Jud. Acts. See also *ante*, p. 91, as to the leave of the court being necessary to interrogate under the new rules.

sion may be made the subject of an objection to production, but that is no reason for not making the affidavit, for it is in the affidavit that the objections are to be taken: see *Rumbold v. Forteath: Lazarus v. Mozley*, 5 Jur. N. S. p. 1120: *Quin v. Ratliff*, 6 Jur. N. S. p. 1329.

(b)

The words "without filing an affidavit" were probably introduced in order to enable the court to dispense with the rule under the C. L. P. Act, 1854: Lindley, L. J. in *Phillips v. Phillips*, 40 L. T. p. 821: under which an affidavit must have been filed showing that there was one document in the other party's possession or power to the inspection of which the applicant was entitled: *Evans v. Louis*, L. R. 1 C. P. 656: Day, C. L. P. 296: and see *Bray v. Finch*, 1 H. & N. 468: *Thompson v. Robson*, 2 H. & N. 412.

The chancery practice under which no such affidavit or any affidavit was required (see *Rochdale Canal Co. v. King*, 15 Beav. 11: Dan. Ch. Pr. 1678) now obtains.

The judge is not bound to be satisfied either from the nature of the case or by an affidavit on the part of the applicant that there is a reasonable probability or *prima facie* evidence of the other party having any relevant documents in his possession before making the order, as suggested by Denman, J. in *Phillips v. Phillips*, 40 L. T. p. 818, and by the court in *Smith v. Johnson*, 36 L. T. 741; and as seems to be the practice in Ireland: see *Healy v. Smith*, I. R. 4 Q. B. C. P. and Ex. D. 72: and *Powell v. Hefferman*, *ibid.* 703. The order was made in chancery without reference to the probability or improbability of the party having any relevant documents in his possession.

See however *ante* (a) and the note thereto as to whether an affidavit of documents is a matter of course under the present rule.

An affidavit may and should be filed where the order is sought at an unusual stage: see for instance *Phillips v. Phillips*, 40 L. T. 815: *Ley v. Marshall*, cited *post*, p. 160: *Hancock v. Guerin*, 3 Ex. D. p. 5, cited *post*, p. 163. And

affidavits may be filed in answer: see *Phillips v. Phillips*: as at common law under the C. L. P. Act, 1854: see *Forshaw v. Lewis*, 10 Exch. 712, where in consequence of the affidavit in answer the affidavit of documents was limited to particular documents, as to which see *post* (c).

(c)

The last part of rule 12 beginning with the words "on the hearing" was not in the old rule 12. As to its effect in inducing the court to refuse altogether an order for an affidavit see *ante* (a). It may be useful in enabling the court either to adjourn the application where there are no documents required, or to confine the affidavit to documents required for the determination of the matter immediately about to be in question (see *Forshaw v. Lewis, ante*, where the affidavit was limited): see generally as to consequential discovery *ante*, Chap. II.: and in particular, p. 26. See as to "the stage of the action" *post*, Sect. II.

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## II. *As to the stage of the Action at which Discovery and Production of Documents will be allowed.*

See *ante*, p. 13, as to the general principles by which the court will be guided in enforcing or withholding discovery on grounds connected with the character of the action or of the pleadings or with the stage of the action at which it is sought.

See also *ante*, p. 93, as to this point in connection with interrogatories.

By rule 14 (see *ante*, p. 152) the order for production may be made "at any time during the pendency of any cause or matter." In dealing with an application for an affidavit of documents under rule 12 (see *ante*, p. 155) the court may consider the stage of the cause or matter.

(a) *As to the Plaintiff before Claim.*

As a rule the plaintiff will not be allowed any discovery of documents whether by way of the order for an affidavit, or by way of an order for production of particular documents, before putting in his statement of claim (where it is intended to deliver one): see Lindley, J. in *Phillips v. Phillips*, 40 L. T. pp. 821—823: Bacon, V. C. in *Cashin v. Craddock*, 2 Ch. D. pp. 145—147, commented on by Baggallay, L. J. in *Republic of Costa Rica v. Strousberg*, 11 Ch. D. p. 326: Bacon, V. C. in *Davies v. Williams*, 13 Ch. D. p. 552: *British and Foreign Contract Co. v. Wright*, 32 W. R. 413 (an action for libel against the “Times,” where the plaintiff sought inspection of the original letter in order to discover the name of the writer, and where it was said that it was no ground for altering the ordinary practice that the sight of the document would assist him in framing his action, when he knew very well his cause of action): and see cases in W. N. 76, p. 53: just as the leave of the court to exhibit interrogatories will be refused except under special circumstances at this stage, see *ante*, p. 96.

Where production of particular documents is essential to the statement of the plaintiff's claim it (or even discovery of documents, see *Whyte v. Ahrens*, *post*) may perhaps be ordered: see Bacon, V. C. in *Cashin v. Craddock*, p. 147: and see the cases *post*: see also *post*, p. 264, as to the common law practice in respect of documents falling within the principles of the common law equitable jurisdiction: and *post*, p. 281, as to documents of a public character such as court rolls corporation documents &c.: but except in the case of documents of that character it was not the practice at common law to make an order before declaration either for inspection under 14 & 15 Vict. c. 99, s. 6, or for an affidavit of documents under the C. L. P. Act, 1854, s. 50 (see as to interrogatories before declaration *ante*, p. 98), though in *Bechervaise v. G. W. R. Co.* L. R. 6 C. P. 36, the plaintiff was allowed before declaration to administer an interrogatory asking in effect for an affidavit of documents.

In an action in the common law division for damages for breach of duty in carrying goods by sea an order was made for an affidavit of documents relating to the cause of action mentioned in the plaintiff's affidavit on the ground that the plaintiff was unable otherwise to frame his claim (his case being that the ship was overladen), though he could have delivered a declaration under the old practice: *Ley v. Marshall*, W. N. 76, p. 23: so also in an admiralty action in rem upon the defendants after appearance, though they had offered to produce the log books protests and other material documents (reference lost).

See also *White v. Ahrens*, cited *ante*, p. 36, where discovery of documents was ordered partly for the purpose of enabling the plaintiff to state particulars of fraud under Ord. XIX. r. 6. See also a case in the Divorce Court, *Shaw v. Shaw*, *post*, p. 564, where inspection was allowed for the purpose of giving particulars of acts of cruelty. But see *post* as to inspection by a defendant for the purpose of giving particulars.

There is a special hardship in an order for an affidavit being made at a stage when it is impossible to say what the matters in question will be: for in such a case the party cannot say which of his documents are relevant and which not: see Lindley, J. in *Phillips v. Phillips*, 40 L. T. p. 823: and see *Mellor v. Thompson*, *post*, p. 162.

Leave to interrogate as to a particular document would perhaps in some cases be allowed: *Phillips v. Phillips*, p. 822.

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(b) *As to a Defendant before Defence.*

So too as a general rule (see *post*, p. 244, as to documents referred to in the plaintiff's pleadings or affidavits under rules 15—18: *post*, p. 264, as to documents falling within the principles of the common law equitable jurisdiction: and *post*, p. 281, as to documents of a public character such as court rolls corporation documents &c.) discovery or production of documents will be refused to a defendant before defence, as is discovery by way of interrogatories: see W. N. 76, pp. 53, 64, 73: *Egremont Burial Board v. Egremont &c. Co.* 14 Ch. D. 158, where Malins, V. C. refused to order production of a conveyance to the plaintiffs (and stated by them in their claim, see as to this *post*, p. 244) in order to see whether it comprised the minerals, in which case the defendants would at once submit to an injunction: and *ante*, p. 96.

In an action on the policy on a ship inspection of the ship's



papers was allowed to the defendant before appearance on the ground that if the defendant satisfied himself that the claim was well founded he would let judgment go by default: *Anon.* 20 S. J. 81: W. N. 75, p. 220: and see a case *ante*, p. 96, where interrogatories were allowed on a similar ground. So a defendant before defence was allowed to have an order for discovery of documents to ascertain how much to pay into court on an affidavit admitting his liability: *Megaw v. M'Diarmid*, L. R. Ir. 10 Q. B. C. P. Ex. D. 376: and see *post*, p. 468, as to interrogatories for this purpose.

At common law (except in the case of documents of a public character or falling within the common law equitable jurisdiction) no order for inspection or an affidavit under the Acts of 1851 and 1854 was ordinarily made before the defendant had pleaded, or had complied with an order for particulars (except perhaps where it was required for the purpose of complying with an order for further particulars: see *Phillips v. Phillips*, 4 Q. B. D. p. 137: see also *Whyte v. Ahrens* and *Shaw v. Shaw*, *ante*: and *ante*, p. 97, as to interrogatories): an affidavit was ordered before plea in *Forshaw v. Lewis*, 10 Exch. 712.

#### The practice in chancery.

It must be remembered that the answer comprised both the defence and the answers to interrogatories: see *ante*, p. 130, as to the circumstances under which production could be obtained before answer in its character of discovery: and see *post*, p. 602, as to priority of discovery.

The ground upon which the defendant was not allowed to see the plaintiff's documents before putting in his answer regarded as his defence was generally stated to be that he and his witnesses might not be able to shape his case according to the evidence which would be brought against him: *Turner v. Burkinshaw*, 4 Giff. p. 402: *Smith v. Lay*, 18 W. R. 915: *Bate v. Bate*, 7 Beav. p. 538: *Halliday v. Temple*, 8 D. G. M. & G. pp. 99—100. Nor, although in some of these cases: *Bate v. Bate*, 7 Beav. p. 538: and *Penford v. Munn*, 5 Sim. p. 510: and in Dan. Ch. Pr. p. 1675: it is said that in such circumstances a cross bill of discovery must have been filed, would any answer to the cross bill have been compelled until after answer to the original bill: see Lord Eldon in *Princess of Wales v. Liverpool*, 1 Sw. p. 124. There were three cases in which the time for answering was extended until production of documents referred to in the bill: but these cases were subsequently disapproved or at all events only justified on their peculiar grounds. These cases *Princess of Wales v. Liverpool*, *Taylor v. Hemming* and *Shepherd v. Morris* and the authorities disapproving them are fully cited *post*, p. 247 to p. 251: but see now as to documents referred to in the pleadings *post*, p. 244.

In chancery under the 15 & 16 Vict. c. 86, s. 20 (see *post*, App. Ch. II.) an order for production could not be made on the plaintiff until after a sufficient

answer by the defendant unless the court should order to the contrary \* (the spirit of the act being that the defendant should not have the benefit of the order until he had himself given the required discovery, see further as to this *post*, p. 603; where therefore none was required he was entitled to the order whether before or after putting in a voluntary answer: see *Bailey v. Dunkerley*, 6 W. R. 835); just as the plaintiff could not have been compelled to answer a cross bill for discovery until the defendant had answered the original bill: see Dan. Ch. Pr. 1675, 1678: *Bailey v. Dunkerley*: and *ante*.

It is clear therefore that the defendant was considered to have no right to general production or to production of particular documents before putting in his defence. In *Smith v. Lay James*, V. C. stated that the court never made an order for production against the plaintiff until the defendant had put in his answer.

Production would under some circumstances be ordered for the purpose of resisting an injunction though the answer had not been put in: see *Cliff v. Bull*, cited *post*, p. 607: but not a case of discovery.

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(c) *The Plaintiff after Claim.*

After claim the plaintiff in a chancery action will (subject of course to objections on other grounds) as a rule (see as to actions where the title to land is in dispute, *post*, pp. 518—524) be allowed discovery and production of documents: *Union Bank of London v. Manby*, 13 Ch. D. p. 241: (not in Ireland, see *Cleary v. Fitzgerald*, I. R. 1 Ch. D. 492, following the practice in the common law division, *post*): and see *Mellor v. Thompson*, 49 L. T. 222, where it was unsuccessfully argued that the Court had no jurisdiction to order discovery of documents before defence on the ground that, the issues in the action not being known, it could not be known whether the documents related to any matter in question (see as to this suggestion, *supra*). The practice at the Rolls Court under Jessel, M. R. was to make the common order on the defendant as a matter of course after statement of claim except in actions for the recovery of land: *Phillips v. Phillips*, 40 L. T. p. 822: and see *post*, p. 519: but see under the present rule, *ante*, p. 156. In a redemption action at all

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\* An answer was technically sufficient until it was excepted to: the better practice was to make the common order as soon as the plaintiff had had time to look into the answer, on the one hand not making it immediately on putting in the answer, on the other hand not postponing it until the expiration of the six weeks within which time the plaintiff could except: see *Morgan*, 4th ed. p. 179, referring to *Walker v. Kennedy*, 5 W. R. 396: *Lafone v. Falkland Islands Co.* 2 K. & J. 276: *Sibbald v. Lowrie*, *ibid.* p. 277 n.

events there is no reason why it should not be made, for there is no doubt what the matters in question are. Even supposing the defendant to admit the plaintiff's case still the plaintiff may have a right to production that he may know whether any other parties are interested: James, L. J. in *Union Bank of London v. Manby*, 13 Ch. D. 241. But see *Carver v. Pinto Leite*, L. R. 7 Ch. p. 92 (cited *ante*, p. 95) as to an allegation by the defendant that his defence will displace the plaintiff's right to production.

In common law actions the plaintiff will often be refused discovery of documents at this stage: *Hancock v. Guerin*, 4 Ex. D. 3: *Union Bank of London*, pp. 241, 242: for in such actions it often cannot be known what are the matters in question until the defence is put in: *Hancock v. Guerin*: *Mercier v. Cotton*, 1 Q. B. D. pp. 444—446: and see *Mellor v. Thompson*, *ante*. The proposition in the head note to *Hancock v. Guerin* that as a general rule it will not be ordered before defence is too broadly stated: see *Union Bank of London v. Manby*, p. 241.

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(d) After defence either plaintiff or defendant is entitled to discovery and production of documents almost as a matter of course: but see *ante*, p. 156, as to the order for discovery of documents, and *ante*, p. 12, generally as to discovery.

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(e) *As to the Plaintiff and Defendant after the Pleadings have closed.*

Discovery and production of documents appears to be frequently ordered in the common law division after the pleadings have closed in favour of either plaintiff or defendant, as at common law under the C. L. P. Acts after issue joined. Nor is there any reason to suppose it would be refused in the Chancery division: see *Chesterfield, &c. Co. v. Black*, W. N. 76, p. 204: (but see as to interrogatories, *ante*, p. 95): and see *Danvillier v. Myers*, 17 Ch. D. 346, cited *post*, p. 606.

### The practice in chancery.

Under the Ch. P. Act, 1852, delay does not seem to have affected a party's right to the common order for discovery.

It was ordered after replication in favour of the plaintiff in *Lafone v. Falkland Islands Co.* (1), 4 K. & J. p. 38: and in *Parkinson v. Chambers*, 1 K. & J. 72: and in favour of a defendant in *Rochdale Canal Co. v. King*, 15 Beav. 11: and even after notice of motion for decree and the plaintiff's affidavits had been filed, proceedings would be stayed for the purpose of discovery: see *Bramber v. Carne*, L. R. 2 Eq. 610. In a plaintiff's favour production was ordered of particular documents admitted by the defendant's answer to be in his possession even after some of the defendant's witnesses had been examined and some of the documents marked as exhibits: *Beaufort v. Taylor*, 2 Ha. 245: so after publication had passed, in *Fencott v. Clarke*, 6 Sim. 8.

In *Waters v. Shaftesbury*, 12 Jur. N. S. 3: 14 W. R. 259: the court refused to order production of particular documents after the cause had been set down for hearing, on the ground that it was too late for them to be required for the defence and that they would be of no service at the hearing.

### III. *As to the Place and Time of Production for the purpose of Inspection.*

See as to production after decree, *post*, p. 567.

The form of order for inspection prescribed by the rules (see App. Ch. I.) directs production at all seasonable times, on reasonable notice for the purpose of inspection and taking copies, the place for inspection being left in blank.

Under rule 17 (see *post*, p. 241) the party is to offer inspection at his solicitor's office, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody: and under rule 18 (see *post*, p. 241) if the party offers inspection elsewhere than at the office of his solicitor the judge may on the application of the party desiring it make an order for inspection in such place and in such manner as he may think fit.

Under section 66 of the Jud. Act the court, or any judge of the division to which any cause or matter pending in the High Court is assigned, may, if it shall be thought fit, order production of any books or documents in a district registry under the circumstances mentioned in sections 64 and 65.

As to the notice necessary to be given for inspection under rules 15 to 17, see *post*, p. 243.

(a) *As to the Place where the Party is primarily bound to produce his Documents for Inspection.*

The practice in the chancery division in this respect has differed from that in the common law division. It was said in *Brown v. Sewell*, 16 Ch. D. p. 519, that there ought to be a uniform rule in both divisions, and it was suggested that the primary obligation of the party should be to deposit the documents at the Central Office to which the Record and Writ Office had been transferred by 42 & 43 Vict. c. 78 (or the district registry : section 66 Jud. Act, *ante*) in accordance (see *post*) with the old chancery practice (and see Ord. LXI. r. 30, *post*, p. 166). No rule however of this kind has been established. Nor on the other hand is it conceived that the indirect effect of the form of order for inspection given 1880 in the App. to the Jud. Act (see App. Ch. I.) and of rule 17, *ante*, is to alter the place of primary obligation in the chancery division, bearing in mind that in that division the production of documents set forth in the affidavit of documents is not obtained under these rules but is ordered in the order directing the affidavit to be made : see *ante*, p. 154. See as to the effect of this difference of practice upon the costs of inspection, *post*, Sect. V.

The practice in the chancery division has been in accordance with the previous practice in chancery. Under that practice the strict rule was that the inspecting party was entitled to have the documents (see as to documents abroad, *post*, p. 171) of which production was ordered deposited\* at the Record and Writ Clerk's Office (now the Central Office, see *ante*) and it afterwards grew to be the practice (but see *post*, p. 172, as to cases in which deposit would be ordered) as a matter of indulgence and convenience to the producing party to allow the documents to be produced at the office of his own solicitors : Jessel, M. R. in *Brown v. Sewell*, 16 Ch. D. p. 518 : and see *Prestney v. Mayor of Colchester*, 24 Ch. D. p. 379 : Dan. Ch. Pr. 1696 : *Prentice v. Phillips*, 2 Ha. p. 154 : *Groves v. Groves*, 2 W. R. 86 : Seton, p. 133 : that is of the

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\* See as to the practice in case of deposit, *post* (b).

London solicitors or agents where notices and summonses are to be served : *Prestney v. Mayor of Colchester*, p. 379 : though it has been sometimes allowed at the office of the country solicitor : see *A. G. v. Whitworth Local Board*, 19 W. R. 1107 : *Bonnardet v. Taylor*, 1 J. & H. 383.

In the common law division the old common law practice was followed. At common law there was no place at which the documents could be deposited, and production was ordered at the office of the solicitor (or town agent, see *Brown v. Sewell*, p. 519) of the owner of the documents : *Brown v. Sewell*, p. 519 : Arch. Pr. 1163 : Day, C. L. P. 304 : *Hill v. Philp*, 7 Exch. 232 : *Republic of Peru v. Weguelin*, L. R. 7 C. P. 352.

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(b) *The Practice in case of Deposit in Court.* \*

(1) *Generally.*

The order directs that the party do within a limited time produce and leave the documents with the proper officers in the Central Office (the Masters of the Supreme Court, see 42 & 43 Vict. c. 78) ; the party his solicitors and agents to be at liberty to inspect and peruse them and to take copies and abstracts thereof and extracts therefrom at his expense ; and the proper officer to produce the same upon any examination of witnesses in the cause and at the trial as the party shall require : with liberty to apply : see Seton, p. 133—134 : Braithw. 506—509 : Dan. Ch. F. 1741.

Documents will be received at the office at any time after the time limited : Braithw. 506—509.

On depositing the documents the original order should if possible be produced : in any case a copy of the order and a schedule of the documents must be left with the documents : Braithw. 506—509. The documents should be made up into

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\* Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same shall be left or deposited in the Central Office, and shall be subject to such directions as may be given for the production thereof : Ord. LXI. r. 30 (following Consol. Ord. XLII. r. 3).

a parcel, or put into a box, the parcel or box to be indorsed with the name of the cause and the name and address of the party or his solicitor, the box to have a key also labelled: Braithw. 506—509.

The proper officer will attend with the documents on a memorandum (see Dan. Ch. F. pp. 938, 940) bespeaking his attendance being left with him and on payment or deposit of the proper fees and his reasonable expenses.\* If the order for deposit is framed as above, no fresh order is necessary where the occasion is the examination of witnesses in the action, or the trial: but in other cases an order (supported by affidavit that production is necessary for the purpose of evidence) is necessary: it may be obtained usually of course: Braithw. 506—509. See special orders in *Taylor v. Sheppard*: *Jones v. Thomas*, *post*, pp. 169, 170.

The court has power to order original documents deposited in court to be taken out of the jurisdiction for the purpose of cross-examination of witnesses before an examiner, all proper care being taken by way of indemnity or otherwise to secure their safe return; but only in a special case: see *Lafone v. Falkland Islands Co.* 4 K. & J. 39, where no such case was shown: and see *Re Stephens*, L. R. 9 C. P. 187.

The fee payable on inspection is 2s. 6d. for each hour or part of an hour, not exceeding on one day 10s.: see Court Fees Sched. Jud. Act. A memorandum must be left with the officer on the inspection: see Dan. Ch. F. p. 938.

Inspection will be refused to any party representing himself to be the plaintiff or defendant or party by whom the documents have been left, unless introduced by his solicitor or is suing or defending in person: Braithw. Pr. 506—509.

Under the ordinary form of order (see *ante*) the plaintiff

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\* On an application with or without a subpoena for any officer to attend as a witness or to produce any record or document to be given in evidence (in addition to his reasonable expenses) for each day or part of a day he shall necessarily be absent from his office the fee is 1l.: and the officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further fees which may probably become payable, and an undertaking to pay any further fees and expenses which may become payable: Sched. of Court Fees, Jud. Act.



his solicitor or agent may inspect in the absence of the depositor; if it is otherwise desired, the order must be qualified: *ibid.*

A party is not allowed to inspect documents left by a co-defendant unless either the solicitor of the plaintiff or of the defendant by whom the documents were left introduces him and sanctions such inspection: in such case he is regarded as the agent of the party introducing him: *ibid.*: but qu. as to a co-defendant, see *post*, p. 178.

The party entitled to inspect may make copies abstracts or extracts at his own expense without any additional charge: or he may get them made in the office for a charge of 6*d.* a folio: Braithw. Pr. 506—509: Court Fees Sched. Jud. Act.

The depositor may inspect the documents without paying any fee: Braithw. 506—509. He cannot have them delivered out to him for any temporary purpose without a special order: see *Jones v. Thomas*, *post*, p. 170.

Deposit would not be ordered for a limited time on the ground that the depositor required them for his defence: *A. G. v. Bingham*, 9 Beav. 159.

(2) *As to Delivery out to the Depositor.*

The documents cannot be delivered out except under an order which, if the parties consent, can be obtained of course. To obtain delivery out of them or any of them a copy of the order (or the note or memorandum: Ord. LII. r. 14) with a receipt for the documents at the foot signed (and witnessed) by the party to whom they are ordered to be delivered must be left, and the original produced; the documents will thereupon be delivered out to the applicant (it need not be the party himself).

The possession of the court is the possession of the depositor: *Carew v. Davies*, 21 Beav. 213: *Beresford v. Driver*, 14 Beav. pp. 391—392.

Where the documents are deposited for the purpose of discovery and not for security the depositor has a right to have the documents back on the purpose of discovery for which they were deposited (including of course production at

the hearing or on other necessary occasions) being satisfied : *Dunn v. Dunn*, 3 Dr. 17 : on app. 7 D. G. M. & G. 25.

The next friend of an infant, who on coming of age had repudiated the suit, could not claim a lien for his costs upon documents deposited by the defendant and prevent them from being re-delivered to the defendant : *ibid.*

In a creditor's administration suit, after all the debts had been paid and the suit at an end, documents were ordered to be re-delivered to the executor who had deposited them and not to the tenant for life : *Plunket v. Lewis*, 6 Ha. 65.

In *Jenner v. Morris*, L. R. 1 Ch. 603, a suit to raise portions, where documents deposited by a tenant for life were only restored to him, with the consent of mortgagees of the terms to secure portions, and on his giving security for their safe custody, for production at reasonable times and return into court if ordered, on the ground that on a former occasion he had taken them out of the jurisdiction without any necessity, the deposit was not for the purpose of discovery.

But the court has ordered a party's documents to be detained in court for the purpose of criminal proceedings against him for forging the plaintiff's signature to them : *Walker v. Cooke*, 8 Y. & C. 377. So in *Taylor v. Sheppard*, 1 Y. & C. 280, where the plaintiffs moved that the documents left by the defendants in the custody of their clerk in court might be ordered to be produced at the trial of H. whom they were indicting for perjury, and also at the trial of the defendants whom they alleged they were going to indict (for what offence it did not appear), the Lord Chief Baron made the order as to the trial of H. but refused it as to that of the defendants, for he could not order them to produce evidence against themselves (and see *post*, p. 314), considering that the court could make such an order as to documents in its own possession, for, if returned to the defendants, they might withdraw them from the hands of justice, for instance a forged will, and distinguishing *R. v. Dixon*, 3 Burr. 1687 (see this case cited *post*, p. 356, n.) on the ground that there the documents were no longer in the court's possession.

A party has been allowed under a special order to have his documents out of court before trial for a particular purpose (commission to examine witnesses) on an undertaking to

return them: *Jones v. Thomas*, 2 Y. & C. 312, where they had been in court for eight years: see the order in *Seton*, p. 168: see also *Lamb v. Danby*, 9 W. R. 765: and see *Beresford v. Driver*, 14 Beav. pp. 391—392.

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(c) *As to Production at other (see ante, sub-section (a)) Places for the purpose of Inspection.*

As a further indulgence to the party whose documents were sought to be inspected production would be ordered in equity at other places than his solicitor's office. Where inspection would suffice (see *post*, p. 172, as to cases where deposit would be insisted on), and deposit in court would be an injury, deposit would not be ordered: *Mayor of Berwick v. Murray*, 1 M. & G. 530. Here the document in question was a deposit receipt for money in a bank the title to which was in dispute in the action: and the court refused to deprive the party of the control which he thus had over the money by ordering it to be deposited in court.

See under the present rules as to bankers' books and other business books *post*.

The following are instances under the old and the present practice:—

See as to "bankers' books or other books of account or books in constant use for the purposes of any trade or business" rule 17, *ante*, p. 164.

Where the documents were in constant use in business and necessary for it, inspection at the place where they were so in use was a matter of course: *Mertens v. Haigh*, Johns. 735: *Grane v. Cooper*, 4 M. & C. 263: *Gerard v. Penswick*, 1 Wils. Ch. Ca. 222: 1 Sw. 534: and the court would give credit to the party's statement on oath that they were in such use, and so necessary: *Grane v. Cooper*: *Gerard v. Penswick*. That they were in constant use was said to be not sufficient: it must also be stated that they could not be removed without inconvenience: see *Hooper v. Gumm*, 2 J. & H. 602.

A local board were ordered (it was ultimately arranged otherwise) to bring their documents, including a minute book to which they had frequent occasion to refer, up to London: *A.-G. v. Whitwood Local Board*, 19 W. R. 1107.

Inspection of a corporation's documents has been allowed at the place where they were kept when they were old, of considerable value, and numerous (3,000 to 4,000) and there would be some risk or at all events inconvenience in bringing them up to London: *Prestney v. Mayor of Colchester*, 24 Ch. D. 376. The order in this case was made upon a summons to vary (see the proper form of procedure, *post*, p. 173) a previous order on the corporation to bring their documents up to their London agents for

inspection. The Court of Appeal made an order for inspection at Colchester Castle where they were kept, but with liberty to the plaintiff to apply with reference to any particular documents which he might desire to inspect in London: and, per Cotton, L. J. p. 386, that it should be only where there were documents as to which there was no reasonable objection to their being brought to London and it might be inconvenient to go to Colchester to inspect them: and, per Baggallay, L. J. pp. 383—384, that the corporation ought to produce in London all such documents as might be deemed necessary on the plaintiff's part in support of his case unless some sufficient reason existed as regards the condition, numbers, or bulk, which would make it unreasonable.

The same rule (see *ante*, p. 165) requiring deposit in court applied when the documents were abroad: *Hooper v. Gumm*, 2 J. & H. 608: though it would be relaxed if the court thought fit. A plaintiff's documents at Beyrout and Alexandria were allowed to be inspected at those places: *Bustros v. Bustros*, 30 W. R. 374: so at Japan in *Whyte v. Ahrens*, 32 W. R. 649. Where a defendant's documents were in India they were ordered to be brought over to the defendant's office in England on condition of the plaintiff's prepaying the expense: *Lindsay v. Gladstone*, L. R. 9 Eq. p. 133.

Where the documents were voluminous and in daily use at a distance, a schedule was ordered to be made of them, the adversary to have copies of such as he required: *Gabbett v. Cavendish*, 3 Sw. 267.

Inspection of court rolls has been allowed at the steward's house in London: *Carew v. Davies*, 21 Beav. 213. And the steward was held not entitled to charge any fees for production: *Hoare v. Wilson*, L. R. 4 Eq. 1.

(d) *As to the Times of Production for the purpose of Inspection.*

See as to the time for inspection on notice under rules 15 to 17, *post*, p. 243.

The order in chancery directing production at other places than at the central office or district registry directs that it shall be at seasonable times and on reasonable notice: see Seton, pp. 133—135: and so the order in the App. to the Jud. Act, see *ante*, p. 164: though in *Mertens v. Haigh*, Johns. 735, p. 739, with reference to business documents, the actual times and duration of inspection length of notice and total period over which the right to inspection should extend were stated in the order. But generally these matters should have been arranged as far as possible by the parties among themselves: see *Rawson v. Samuel*, 8 L. J. Ch. 74: *Prentice v. Phillips*, 2 Ha. 153.

Under the C. L. P. Acts the times for inspection seem to have been inserted in the order: see Arch. Pr. 1163: *Rogers v. Turner*, 21 L. J. Ex. 8.

(e) *Miscellaneous, as to Time and Place.*

In determining the place at which the production is to be made the court will have no regard to the question whether the party seeking inspection is rich or poor: see Pearson, J. in *Prestney v. Mayor of Colchester*, 24 Ch. D. p. 380.

But where the plaintiff was a pauper inspection of the defendant's documents was ordered at the office of defendant's solicitor instead of deposit in court in order to avoid expense to the defendant: *Roberts v. Lloyd*, 7 L. J. Ch. 114.

These matters of time and place are matters for the discretion of the judge and the Court of Appeal will not interfere unless it has been exercised on a wrong principle: see *Prestney v. Mayor of Colchester*, 24 Ch. D. pp. 383, 385, and 382, referring to *Bustros v. Bustros*, 30 W. R. 374.

Where there was ground for suspicion that the documents might be tampered with, deposit in court would be ordered: *Mertens v. Haigh*, Johns. p. 738.

Where there was reason to believe that a document might not be produced at the hearing which it was essential for the purpose of justice should be then produced, as for instance where a question turned upon the variations between one document and another and a comparison was necessary, deposit in court would be ordered: see *Beckford v. Wildman*, 16 Ves. p. 438: *Addison v. Walker* there cited: *Princess of Wales v. Liverpool*, 1 Sw. p. 125: and *post*, p. 258. But in some cases of that kind it has been considered sufficient to order production at the hearing without any right at all of prior inspection: see *Beckford v. Wildman* and other cases cited *post*, p. 258.

Where a satisfactory inspection could not be had the court would order deposit in court or make some other order to meet the necessities of the case: see *Grane v. Cooper*, 4 M. & C. 263: *Prentice v. Phillips*, 2 Ha. 153: *Coleman v. West Hartlepool, &c.* 5 L. T. 266: Braithw. 506—509.

Deposit in court was ordered (for what reason does not appear) in *Abud v. Riches*, 21 Ch. D. 360.

Generally deposit in court may be ordered for security:

*Latimer v. Neate*, 11 Bli. p. 146 : *Lingen v. Sampson*, 6 Mad. 290.

Proceedings will if necessary be stayed pending inspection: see *post*, p. 583, for instance where the party has not been able to get sufficient opportunities for inspection: *Rawson v. Samuel*, 8 L. J. Ch. pp. 73—75 : and see the form of order *post*, App. Ch. I.

The producing party may claim in his affidavit of documents permission to produce his documents at some other place or places than the place where he is primarily bound to produce them : or he may apply for leave to produce them elsewhere : and if necessary to file an affidavit for this purpose to distinguish the documents : see for instance *Mertens v. Haigh* : or see the form of order in *Prestney v. Mayor of Colchester*, *ante*, p. 170 : the costs of the application according to that case (but according to *Mertens v. Haigh* only if resisted : and see *Gardner v. Dangerfield*, 5 Beav. 389) to be costs in the cause : and see *post*, Section V. as to the costs of inspection.

Where an order has been made directing the mode in which parties are to avail themselves of their right to inspection it is open to the party against whom the order is made to take out a summons before the same judge or his successor that notwithstanding the previous order fresh directions as to the mode of inspection may be made and if new facts are brought before the court to show that to follow the precise directions of the previous order will cause unnecessary inconvenience or other injury such an order should be made : see Cotton, L. J. in *Prestney v. Mayor of Colchester*, 24 Ch. D. p. 385, and Baggallay, L. J. *ibid.* p. 381 : and see *Gabbett v. Cavendish*, 3 Sw. 267 n. : *Mertens v. Haigh*, Johns. 735 : *Bartley v. Bartley*, 1 Dr. 283 : *Gardner v. Dangerfield*, 5 Beav. 389 : *A. G. v. Whitworth Local Board*, 40 L. J. Ch. 592.

It was not the practice of the court in equity to order production at any other place than in court in favour of the inspecting party except by consent : *Maund v. Allies*, 4 M. & C. 507 : Dan. Ch. Pr. 1696.

IV. *As to taking Copies, Abstracts or Extracts.*

See as to documents deposited in court *ante*, III. (b).

The right to take copies at the party's own expense (abstracts extracts and copies: *Wadeer v. E. I. Co.* 8 D. G. M. & G. p. 186) accompanied the right to inspection in chancery whether the documents were deposited in court or produced elsewhere: and the order was in these terms: see Seton, pp. 133—134: *Coleman v. West Hartlepool Co.* 5 L. T. 266. The usual practice was to take them from the solicitor of the party whose documents were being inspected: *Bonnardet v. Taylor*, 1 J. & H. p. 387: but the inspecting party had a right to make them for himself: see *Kennedy v. George*, 6 W. R. 218: *Bonardet v. Taylor*, 1 J. & H. p. 387; though at an earlier date the practice was not settled: see *Prentice v. Phillips*, 2 Ha. 153.

The right to have copies obtains equally under the present practice: see the order in the App. to the Jud. Act (*post*, App. Ch. I.) “to take copies, abstracts and extracts:” and see *Pratt v. Pratt*, 47 L. T. 249: 30 W. R. 387, where Bacon, V. C. disapproved Lord Romilly's decision in *Lockett v. Cary*, 10 Jur. N. S. 144 (cited *post*, p. 205) refusing liberty to the plaintiff to take copies of documents on which the defendants claimed a lien as solicitors, on the ground that if a party inspected he took a copy in his memory and a copy was only for the purpose of assisting his memory. But a copy may be required for the purpose of consulting other persons or that it may be used at the trial for pointing out particular entries relied on: *Draper v. Manchester and Sheffield R. Co.* 3 D. G. F. & J. p. 27.

But the right is not to make copies as under the old chancery practice. By Ord. LXV. r. 27 (18), it is provided as follows:—As to taking copies of documents in possession of another party or extracts therefrom under rules of court or any special order the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may by writing require at the rate of 4*d.* per folio: and if the solicitor of



the party producing the document refuses or neglects to supply the same the solicitor requiring the copy or extract is to be at liberty to make it and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

See further as to the costs of inspection and copies, *post*, Section V.

Facsimile copies by photograph or otherwise of letters and envelopes containing the alleged libels in an action for libel were permitted to be taken by the defendant in *Davey v. Pemberton*, 11 C. B. N. S. 628.

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#### V. *As to the Costs of Inspection.*

Under the C. L. P. Act the order for inspection provided for the costs of inspection and unless provision was so made it seems that no costs of inspection could be recovered: *Republic of Peru v. Weguelin*, L. R. 7 C. P. 352: *Hill v. Philp*, 7 Exch. 232: *Smith v. G. W. R. Co.* 6 E. & B. 405: Day, C. L. P. 304: and see since the Jud. Act, *Mitchell v. Darby Main Colliery Co.* 10 Q. B. D. 457, as to inspection of property referred to *post*, p. 577: but qu. whether any order is necessary, and whether the costs cannot be dealt with on taxation upon the principles discussed *post* in every case without any order being made at all: and see the form of order for inspection *post*, App. Ch. I.

In chancery (see *ante*, p. 165) the primary obligation of the party being to produce his documents at the Record and Writ Office, now the Central Office, and it not being the practice to allow to the party his costs of production there, although he was successful in the action, so equally would he be refused (on taxation as between party and party) his costs of production at his solicitor's office: for he could not make his opponent pay more costs, because for his own (the party's) convenience, the opponent waived his strict right to have the documents deposited: and the rule is still the same in the Chancery Division: see Jessel, M. R. in *Brown v. Sewell*, 16 Ch. D. pp. 518—519: *Flockton v. Peake*, 12 W. R. 1023

(costs of solicitor's attendance) : nor could the solicitor charge for it against the inspecting party : *Woodroffe v. Daniel*, 10 Sim. 126 : *Flockton v. Peake*.

On the same ground where (as was the usual practice see *Bonnardet v. Taylor*, 1 J. & H. p. 387) copies were made by the solicitor, only the usual law stationers' charges could be charged against the inspecting party, for he was entitled to take them himself : *Kennedy v. George*, 6 W. R. 218 : and see *Prentice v. Phillips*, *ante*, p. 174 : see as to the present practice Ord. LXV. r. 27 (18), cited *ante*, p. 174.

At common law the rule was different. There was no place at which the documents could be deposited, and production was ordered at the office of the party's solicitor or town agent as a matter of right : the costs of inspection therefore were (except in exceptional cases when they would be ordered to be costs in the cause) ordered to be paid by the inspecting party : *Brown v. Seicell*, p. 519 : Arch. Pr. 1163 : Day C. L. P. 304 : *Hill v. Philp*, 21 L. J. Ex. 82 : 7 Exch. 232 : *Republic of Peru v. Weguelin*, L. R. 7 C. P. 352 ; the usual order providing that 4*d.* a folio should be charged for copies, and 6*s.* 8*d.* costs, or the same or a less sum per hour if for a long inspection, according to the discretion of the taxing-master : *Republic of Peru v. Weguelin*.

The inspecting party must according to the chancery practice bear his own costs of inspection : *Brown v. Seicell*, 16 Ch. D. pp. 519, 520 : (but see as to inspection under Ord. XXXI. r. 15, Ord. LXV. r. 27 (17)\*) ; but only it is conceived when the inspection is in London. In *Prestney v. Mayor of Colchester*, 24 Ch. D. 376, it was held by the Court of Appeal that the parties asking for the indulgence must undertake to pay such additional costs as the judge at the hearing might hold to have been reasonably incurred by reason of the production being ordered at Colchester (where the defendant's corporation documents were kept) instead of in London : the

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\* As to inspection of documents under Ord. XXXI. r. 15, no allowance is to be made for any notice or inspection unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection. Ord. LXV. r. 27 (17).

terms of the order made by Pearson, J. (liberty to apply for any additional costs) not being sufficiently stringent.

As to the costs of making copies, only the costs of copies of material documents will be allowed, and the taxing-master must use his discretion: *Millard v. Burroughs*, W. N. 80, p. 4. See as to the charge for and practice as to copies, Ord. LXV. r. 27 (18), *ante*, p. 174.

## VI. *As to the Persons who may Inspect.*

### (a) *The ordinary Rule.*

Under rule 15 (see *post*, p. 240) the right of inspection is confined to the party or his solicitor.

The practice in the Chancery Division has been in accordance with the old chancery practice.

The ordinary rule (whether the documents were deposited in court or not, *Bartley v. Bartley*, 1 Dr. 233) was to order production to the party his solicitors or agents: *Boyd v. Petrie*, L. R. 3 Ch. 818: *Williams v. Prince of Wales, &c. Co.* 23 Beav. p. 339: and see the forms in Seton, pp. 133—134: and *post*, App. Ch. I.

In *Head v. Willey*, 25 S. J. 943, the order directed inspection “by a person to be agreed on by the parties, or if not agreed upon then by a person to be approved by the master,” and the court refused to vary it by giving leave for the party or his accountant or nominee to inspect, for the other party would have no opportunity of objecting. But *qu.*

In *Mertens v. Haigh*, Johns. p. 739, it was restricted to the party or one agent to be named in the order.

An undertaking to produce to a party implied an undertaking to produce to his solicitors or agents: *Williams v. Prince of Wales, &c. Co.*

No exact definition of the term “agents” was ever given. The following are the cases on the point:—

It was suggested by Turner, L. J. in *Draper v. Manchester, &c. R. Co.* 3 D. G. F. & J. 23, p. 27, that it did not necessarily mean legal agents, but that they must be general agents and not special agents appointed for the particular purpose of inspecting (an ordinary agent, perhaps a managing clerk, not an agent *pro hac vice*: *Bonnardet v. Taylor*, 1 J. & H. pp. 385—386), just as “his solicitors” meant his solicitors in the suit; that it meant

perhaps persons who have been or are in some way connected with the suit. In this case it was held that the accountant of a neighbouring railway was not an agent within this meaning for the purpose of inspecting the accounts of the defendant railway company; though it seems to have been doubted whether an accountant was necessarily outside the meaning, but qu.: see *Lindsay v. Gladstone*, post.

In *A. G. v. Whitworth Local Board*, 19 W. R. 1107: the party's general or estate agent was held to be an agent for this purpose, he being the agent of the property to which the suit had relation and in fact the only person who could understand the documents.

A plaintiff was not allowed to take another defendant with him by calling him his agent: *Bartley v. Bartley*, 1 Dr. 233. Qu. as to its being permissible for a plaintiff to take a co-defendant as his agent to inspect documents in court as said in *Braithw. Pr.*: see *ante*, p. 168.

A party's uncle was not considered for this purpose as his agent, though said to be the only person conversant with the documents: *Summerfield v. Pritchard*, 17 Beav. 9.

See also *Republic of Costa Rica v. Erlanger*, 44 L. J. Ch. 402.

Qu. whether any personal objection can be raised to the party's solicitor or bonâ fide agent.

In *Brown v. Perkins*, 2 Ha. 540, a suit for partnership accounts by the representatives of the deceased partner against the surviving partner, the latter objected that his clients' interests would be prejudiced by disclosure to a local solicitor; the objection was not recognized as a valid one though it was ultimately arranged that a disinterested town solicitor should inspect: see also *Gough v. Offley*, 5 D. G. & Sm. 653: in *Draper v. Manchester, &c. Co.* *ante*, the person objected to was not the party's agent.

### (b) *Special Persons.*

In chancery if it was desired to take a special person to inspect a special application on special grounds must have been made: *Boyd v. Petrie*, L. R. 3 Ch. p. 819.

Where an inspection would practically be useless without such special assistance it would be allowed, as for instance a mining inspector in actions relating to mines, or scientific persons in patent actions: see *Bonnardet v. Taylor*, 1 J. & H. pp. 386—387. The following are instances:—

In *Swansea Vale Co. v. Budd*, L. R. 2 Eq. 274, a special order was made for a surveyor or engineering agent to inspect certain engineering maps and plans, on the ground that the party was not possessed of sufficient engineering knowledge to inspect them to any purpose.

Where the accounts were extensive and kept in Indian currency a special order was made on behalf of the plaintiff (who as assignee had revived a suit brought by a bankrupt) for inspection by himself his solicitors or agents with the assistance of the bankrupt as accountant: and upon the defendant's refusing the bankrupt inspection unless accompanied by the plaintiff or his solicitor, it was ordered on the plaintiff's application that he should be allowed to inspect accompanied by a duly authorized clerk of the plaintiff's solicitor: *Lindsay v. Gladstone*, L. R. 9 Eq. 132.

In proceedings in a winding-up, where the transactions were complicated, an order was made for inspection (with liberty to take extracts) by an

accountant on behalf of contributories at their expense, some person being present to see that the books were not tampered with: *Re Joint Stock Discount Co.* 15 W. R. 99.

Where the accounts were complicated and in French a special accountant was allowed: *Bonnardet v. Taylor*, 1 J. & H. 383.

In *Republic of Peru v. Weguelin*, 41 L. J. Ch. 166, a number of persons not exceeding twelve, whose names and addresses the party (plaintiff) seeking discovery was to give, were allowed to have inspection in a large room which he offered to hire for the purpose next door, he consenting to provide safes and to allow the defendants to keep a clerk there, the room in which inspection had been offered not being large enough to contain all the documents.

In *Blair v. Massey*, Ir. Rep. 5 Eq. 623, the party's counsel was allowed to inspect.

It was not generally (though in some cases it might be so: see *Draper v. Manchester, &c. Co.* 3 D. G. F. & J. p. 27) any answer to applications for inspection by special persons that copies of the documents could be made and shown to them: *Sicantsea Vale Co. v. Budd*, L. R. 2 Eq. 274: certainly not where the documents were numerous or long, and it would be oppressive to compel such copies: *Bonnardet v. Taylor*, 1 J. & H. pp. 387—388.

Inspection by witnesses before giving their evidence, by experts, has sometimes been allowed in the case of documents charged to be forged or otherwise not genuine.

Where there was grave reason to suspect that documents which had been produced in evidence by a creditor in support of his claim under a decree were not genuine, deposit (or rather the documents being then in the custody of the chief clerk it was ordered that they should remain there with liberty for the creditor to apply to take them out if detained for an unreasonably long time) with the chief clerk was ordered for inspection before him by the applicant's witnesses: *Groves v. Groves*, Kay, App. 19: 23 L. J. Ch. 199, cited in *Boyd v. Petrie*, L. R. 3 Ch. p. 819, a previous application to that effect before they had been actually produced in evidence having been refused and only the common order for inspection at the solicitor's office being made: 2 W. R. 86: and, on the creditor objecting that the applicant would only call those witnesses who reported favourably for him, it was ordered that the names and addresses of the persons to whom he intended to submit them should be handed to the chief clerk and that the inspection should take place in the presence of the creditor's solicitor: see the form in Seton, p. 140.

In *Blakesley v. Pigg*, 20 L. T. 57, on the application of residuary legatees alleging that they believed two promissory notes on which creditors claimed under a decree to be not genuine, an order was made for their deposit (and also of an account book) with the chief clerk for a month for examination by experts, the applicants to have free access to them.

But where defendants merely stated in their answer that they did not know whether or not they had executed certain documents (transfers of mortgages to the plaintiffs), and the application was only supported by a loose affidavit of their solicitor, who had inspected them under the common order, to the effect that it was material that they should be inspected by experts without any statement that it was believed they were forged, the application was refused: *Boyd v. Petrie*, L. R. 3 Ch. 818, reversing 5 Eq. 290.

In *Twentyman v. Barnes*, 2 D. G. & Sm. 225, an application was made for leave to submit a document impeached for forgery to chemical tests: the application was refused on an undertaking that it should not be removed from the custody of the clerk of records.

See also *Swift v. McTernan*, cited *post*, p. 258, where production of a document alleged to have been altered for examination by witnesses before the hearing was refused and an order made only for its production at the hearing. See further as to documents whose genuineness is impeached, *post*, p. 246.

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## VII. *Production otherwise than for the purpose of Inspection.*

The order in chancery directs production upon any examination of witnesses in the action, and at the hearing: see Seton, pp. 133—134: and see as to deposit in court *ante*, p. 167.

The order in the Appendix to the Jud. Act (see App. Ch. I.) is confined to directions for production for the purpose of inspection.

See as to production on examination of witnesses out of the jurisdiction *Lafone v. Falklands, &c. Co. ante*, p. 167.

The costs of production in town on the examination of witnesses and at the hearing, where the documents are not deposited in court (see as to the practice in case of deposit *ante*, p. 167), must be borne by the producing party in the Chancery Division, it being for his own convenience that deposit has not been ordered (see *ante*, p. 165, and *ante*, p. 175); but where production for this purpose is required in the country, it must be at the expense of the inspecting party: *Davies v. Harford*, 3 Beav. 118.

In some cases the only order made has been for production at the hearing: see *Beckford v. Williams* and other cases cited *post*, p. 258, and *ante*, p. 172.

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## VIII. *Relevant Documents.*

An admission of relevancy is necessary, see *ante*, p. 153: and see *post* (d). The party's oath (direct, or indirect as by omission from the affidavit of documents) that a document is irrelevant (see *post*, p. 187, as to irrelevancy to a particular

[Cancel last four lines of preceding page].

(α) *The Validity of the Party's Oath as to Irrelevancy—the necessity of an Admission of Relevancy.*

An admission by the party of relevancy is necessary: see *ante*, p. 153: *post*, p. 230: and see *post* (d).

The party's oath that a particular document is irrelevant (see *post*, p. 187, as to irrelevancy to a particular matter in question) is conclusive, unless the court is reasonably satisfied from certain definite sources (these sources being, it is conceived, the same as those into which the court may look for the purpose of testing the sufficiency of an affidavit of documents, see *post*, p. 215) that, in spite of his oath to the contrary, the document is relevant. Mere suspicion (derived from these sources) that the document may be relevant, although it is sufficient to justify the court in ordering the party to make a further affidavit of documents (see *post*, p. 215), does not entitle the court to order its production in the face of a specific statement of irrelevancy. Where, therefore, the court has ordered a further affidavit on the ground of the suspected omission of relevant documents, and the party has in his further affidavit sworn (specifically or generally, according to the form of order for the further affidavit, see *post*, p. 219) that the documents are irrelevant, the court can go no further: it cannot disregard his oath unless reasonably satisfied of its untruth.

The above considerations rest on the fundamental principle that the party's admission of relevancy is necessary before the court can order production: the sole justification for the court's disregarding the party's specific statement of irrelevancy is that these definite sources contain matter which is equivalent to an admission of relevancy. They were, however, very clearly set forth in the judgment of Cotton, L. J. in a recent case (not reported) of *Compagnie Financière v. Peruvian Guano Co.* In this case a further affidavit of documents had been ordered: see *post*, pp. 184, 215. A further affidavit was made, and therein the party swore that certain documents were irrelevant. The Divisional Court ordered production of them, applying the dictum of Brett, M. R. (cited *post*, pp. 183, 184, 215), and considering that it was not unreasonable to suppose that the documents might be relevant. The Court of Appeal reversed the decision: Cotton, L. J. on the grounds stated above, that is to say, distinguishing between the case of a further affidavit of documents, to which alone the dictum of Brett, M. R. could be applicable, and the case of production: Brett, M. R. considering that the Divisional Court had unduly strained the language he had used in the former case, and that the reasonable supposition must be founded upon something definite in



the sources to which the court might look, and not otherwise. Reference may also be made to the judgment of Cotton, L. J. in *Lyell v. Kennedy*, 27 Ch. D. at pp. 19—22, referred to *ante*, p. 109, and *post*, p. 215; and, in particular, at pp. 21, 22: and also to the cases of sealing up parts of documents, *post*, pp. 233—235.

Where the party states the grounds on which he contends the document to be irrelevant, the court can, of course, determine for itself the validity of these grounds, and is not bound by his conclusion: see also *ante*, p. 18, as to where the question of relevancy is or depends upon a question in the cause.

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(a) *As to what are Documents relating to any Matter in question so as that they must be included in the Affidavit.*

As to limiting the affidavit to particular classes of documents under rule 12, see *ante*, p. 158.

Documents the contents of which are only consequentially relevant must be included unless it is limited so as to exclude them. See as to consequential discovery, *ante*, p. 24.

Documents which may have to be delivered up or cancelled, as part of the relief prayed, should be included; for example, the title deeds of the property sought to be recovered, though they have no bearing on any of the issues. The practice in chancery was to schedule all such documents in the answer in early times in the affidavit after the C. P. Act. Before this act all documents had to be scheduled "which related to the matters contained in the bill, or whereby their truth would appear": *Mansell v. Feeney*, 2 J. & H. p. 318: in some respects perhaps (though in other respects it was narrower, see *post*, p. 500) this expression was wider than the form "relating to any matter in question." The reason for scheduling them was that the plaintiff might get a perfect decree (see *ante*, p. 21), for without an admission of possession and a list or description of them no order for their delivery or cancellation could be made: see *ante*, p. 23: and if not in the defendant's possession at the time (or not in his sole possession, see *post*, p. 198), the names of the persons

having any possession of them could have been required, in order that, if necessary, the persons having possession of them might be made parties: see *ante*, p. 19, though no production of them could be ordered, for their contents had no bearing on the matters in question: see *ante*, p. 23. And it is conceived that the affidavit of documents is now the proper machinery for giving this discovery: see the 6th paragraph of the form of affidavit given in the Appendix to the Rules (App. Ch. I.): and see *post*, p. 234, further as to the various purposes of the affidavit. It may be noted that Lindley, L. J. in *Phillips v. Phillips*, 40 L. T. p. 821, an action for the recovery of land, considered that matter in question did not mean thing in dispute as land or a ship nor matter in issue, for issue might not yet be joined, but the alleged title of the plaintiff.

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- (b) *As to what are Documents relating to a particular Matter in question, that is to say, Documents material for its Determination as distinguished from Documents only consequentially relevant.*

See generally as to relevancy, *ante*, Chap. I. Sect. II.

The mere fact that a document mentions the subject of dispute, for instance a private letter, cannot make it in this sense a document relating to the matter in question.

“Relating to” must mean “relevant, material, pertinent.”

Every document which will throw any light on the case is *prima facie* subject to inspection: Blackburn, J. in *Hutchinson v. Glover*, 1 Q. B. D. p. 141.

Documents relating to any matter in question in the action are not confined to those which would be evidence either to prove or disprove any matter in question in the action: Brett, M. R. in *Compagnie Financière, &c. v. Peruvian Guano Co.* 11 Q. B. D. p. 62. “It seems to me that every document relates to the matters in question in the action which not only would be evidence upon any issue but also which it is reasonable to suppose contains information which may—not which must—either directly or indirectly enable the party requiring the

affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because as it seems to me a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry (see *Daniell v. Bond*, *post*, and *ante*, p. 113, as to interrogatories) which may have either of these two consequences:" Brett, M. R. *ibid.* p. 63: and see Baggallay, L. J. *ibid.* p. 60.

In this case the plaintiffs contended that there was a concluded agreement and a breach thereof on a particular date: the defendants contended that there never was a concluded agreement but only a continuing negotiation: the documents in question, being documents referred to in a minute book disclosed in the plaintiffs' affidavit of documents (drafts of arrangements between the plaintiffs and defendants, letters and telegrams from and to their agents) but not themselves disclosed in the affidavit of documents, were (with certain exceptions) subsequent to the alleged breach: if the plaintiff's case were true (see as to this point *ante*, p. 18) they could not be material, and on this ground Pearson, J. refused to order a further affidavit in respect of those subsequent to the alleged breach: the Court of Appeal ordered a further affidavit in respect of these also, holding that according to the defendant's contention they were material, for that new propositions in a continuing negotiation were part of the negotiation, and that it was not unreasonable to suppose that the documents contained information which might show that there were continuing negotiations (pp. 64—65): and that if any of them were negotiations to effect a settlement privilege could be claimed for them in the affidavit, for negotiations to effect a settlement could not be material (see *post*, p. 186) with regard to matters in dispute in the action (p. 65): see generally as to ordering a further affidavit and the result of this decision in connection therewith *post*, p. 219.

That a document would not be admissible in evidence was never a ground either at law or equity for not granting inspection: Jessel, M. R. in *Bustros v. White*, 1 Q. B. D. p. 425: and see *Nicholl v. Jones*, 2 H. & M. p. 593: and *Whiffen v. Hartwright*, 11 Beav. p. 112. Whether a document would be evidence or not for the party claiming inspection is not a test of the right to it: Blackburn, J. in *Hutchinson v. Glover*, p. 141. For instance correspondence containing mere matter of opinion by a non-legal agent must be produced: *Bustros v. White*, p. 427 (an opinion gratuitously expressed as to the prospect of the plaintiff's success: *ibid.* L. J. Notes of Ca. 1876, p. 130). Qu. as to *Corp. of Bristol v. Cox*, 26 Ch. D. p. 684, where Pearson, J. seems to have

considered certain cases and opinions immaterial on the ground that, the issue being whether the corporation were in fact right, the documents could only show that they did what they thought was wrong which could not affect the issue.

However in a common law case before the Jud. Act, *Richards v. Gellatly*, L. R. 7 C. P. 127, inspection of certain documents was refused on the ground that they would not be admissible for any purpose. In this case which was an action against the agents to a ship for false representations as to its character and accommodation the documents consisted of letters from other passengers to the defendants complaining of the ship and refusing to proceed in her (some of the complaints being met by a return of part of the passage money), and letters from the captain and owners written after such complaints: Brett, L. J. at p. 132 apparently considered not only that it was no ground for inspection that the documents might afford useful materials for cross-examination (as to which see *post*, p. 186), but also that it was a ground for objecting to produce them that they might be used to the defendant's prejudice in order to show that they had not thought it worth while to resist these claims. But in the first place as to the principle; it is no ground for protection of a relevant document that its production might be injurious to the party producing it if made use of before a jury: see Jessel, M. R. in *Bustros v. White*, 1 Q. B. D. p. 427. And in the second place as to the actual decision. In *Hutchinson v. Glover*, 1 Q. B. D. 138 an action against shipowners by the owners of cargo shipped on the defendants' vessel for damage thereto caused by collision with another ship, production was ordered of documents that had passed between the defendants and the owners of the other ship in the course of arranging a compromise of the litigation which had been commenced between them in respect of their liability for the collision, on the ground that if they turned out to contain an admission by the defendants of their liability it would be quite relevant: see Blackburn, J. p. 140: and see *Combe v. City of London*, 4 Y. & C. pp. 156—157. This case was affirmed in the Court of Appeal, 33 L. T. 834, it appearing then that the previous litigation dealt also with the damage to the cargo.

In marine insurance cases the documents necessary to be set out in the affidavit were not confined to such as would be evidence to support or defeat any issue in the cause: Brett, M. R. in *Compagnie, &c. v. Peruvian, &c. Co. ante*, at p. 62: and see *Daniell v. Bond*, 9 C. B. N. S. pp. 723, 724.

All suitors have a right to all documents having a proximate bearing on the case and affording information in respect of the matters in issue in the cause: *ibid.* p. 724: qu. whether this was intended to apply to all cases or only to actions of the same nature as *Daniell v. Bond*, that is to say, dealing with ships' papers. See further as to this case *post*, p. 515: and generally as to underwriters, *post*, p. 557.

In this case in answer to the contention that it was not a ground for ordering inspection of documents that the party might thereby be put on the track to discover evidence (and

see *ante*, p. 184) Williams, J. (p. 722) said that the documents might point to the witnesses who could prove the plaintiff's case, namely the persons who did the repairs to the ship: (see as to discovery of witnesses, *post*, p. 298).

See as to documents relating to compromises of other litigation or matters in dispute: *Hutchinson v. Glover*, *ante*: and *post*, p. 555, in reference to patent actions.

A defendant was refused inspection of documents relating to negotiations for a compromise of the action between the plaintiff and other defendants and sworn by the plaintiff not to affect the defendant seeking inspection: *Bagnall v. Carlton*, W. N. 76, p. 215.

Documents relating to a compromise between defendants and other persons were protected on other grounds in *Warrick v. Queen's Coll.* see *post*, p. 201.

See as to negotiations to effect a settlement: *Compagnie Financiere, &c. v. Peruvian Guano Co.* *ante*, p. 184. But qu.

That documents may be material for cross-examination clearly does not of necessity make them relevant: for cross-examination may travel into matters wholly irrelevant. See *ante*, p. 113, as to this point in connection with interrogatories: and see *Richards v. Gellatly*, *ante*.

Qu. as to inspection in order to prepare for cross-examination, see *Ladds v. Walther*, *post*, p. 569.

Documents required merely for comparing handwriting may perhaps in some cases be relevant so as to require being scheduled: *Wilson v. Thornbury*, L. R. 17 Eq. 517. In this case the genuineness of the testator's signature to a receipt was in issue, and the executors having produced several cheques signed by the testator were held not bound to schedule or produce others the signatures to which they had stated in the affidavit to be forgeries.

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(c) *As to distinguishing Documents admitted to relate to the Matters in question but sworn to be immaterial for the Determination of the Matter immediately in question.*

It has been seen (*ante*, pp. 24—27) that under the provisions of rules 20, 1, 6, and 12 the court has an absolute discretion to postpone all discovery which is not required for

the actual determination of the issue or matter in question immediately about to come on for trial, and (see *ante*, p. 31) that even under the old chancery practice the judges considered themselves at liberty to withhold the production of documents which would be of use only if the plaintiff succeeded in establishing his case and would not assist him in establishing that case.

It is necessary therefore in respect of documents of this kind (see for instance *Lyell v. Kennedy*, 8 App. Cas. p. 229) and in particular in respect of documents which are scheduled only in order that a party may obtain complete relief by an order for their production delivery or cancellation, and production of which the court has no right to enforce (see *ante*, p. 23), to distinguish such documents from documents material for the determination of the matter immediately in question.

The question therefore arises how the court will satisfy itself that any documents whether scheduled in the affidavit of documents or referred to in the party's pleadings or other affidavits are immaterial to the issue or matter immediately in question.

Now with respect to documents falling within the principle which protects the party's "evidences" rules to some extent precise have been laid down as to the manner in which the claim to protection must be asserted and the degree of credit to be attached to such an assertion. No rules of a similar character have ever been laid down in respect to documents sought to be protected on the grounds now being considered. In some cases, such as for instance *Bannatyne v. Leader*, cited *post*, p. 189: *Mansell v. Feeney*, cited *post*, p. 188: (and see the other cases cited *post*, p. 189): the distinction between documents which the party admits to be material to the determination of the issue but which he asserts to exclusively evidence or relate to his own case, and documents which he asserts to be not material to its determination at all but only consequentially relevant, is not always sufficiently observed. The questions are essentially distinct in principle. It seems however from the cases on the subject (cited *post*, p. 188) that

the court will accept from the party a precise assertion to the effect that they are immaterial to the determination of the matter immediately in question, where it is not contradicted or inconsistent, as is pointed out *ante*, p. 181, and where it is borne out or at all events not contradicted by the description of the documents. In respect of documents exclusively evidencing or relating to the party's own case, it has been established (see *post*, p. 488) that no description either general or individual is necessary. Whether a bare statement of immateriality to the determination of the matter immediately in question without any description is sufficient to protect documents admittedly generally relevant may be doubted. The practice in chancery was always to describe (in early times individually in later times more generally, see *post*, p. 490) the documents. No doubt a statement express or implied (as by omission from the affidavit of documents: see *post*, p. 211) that certain documents are altogether irrelevant to the matters in question is conclusive, if not contradicted or inconsistent as *ante*, p. 181, though it may really involve a question of law: see Wigr. Pl. 317: Hare, p. 230. But it does not follow that the same conclusiveness attends a statement of the kind now under consideration.

The following are the principal cases bearing on the point: see also *Roucliffe v. Leigh* and *Verminck v. Edcards*, cited *ante*, p. 27: and the cases cited *ante*, pp. 32, 33.

The following passage in Lord Hatherley's judgment in *Mansell v. Feeney*, 2 J. & H. p. 323 (also cited *post*, p. 483, as bearing on the question of the production of documents exclusively evidencing or relating to the party's own case or title) bears also (see *ante*) on this question. "The real question is how far the documents in dispute will assist the plaintiff in making out his title at the hearing. It is clear that all documents which manifestly can have no bearing on the issue are protected. On the other hand the rule is, that a defendant cannot protect himself from production by swearing that the contents of relevant documents are not such as to assist the plaintiff's case. He is bound to put his affidavit in the common form of setting out all the documents which relate to the matters in question in the suit. Here he has admitted that these documents are relevant. From that it would follow of course that they should be produced notwithstanding an allegation that they will not prove the plaintiff's case. The court accepts the defendant's statement on oath as to what documents are relevant, but when this is once admitted the court does not accept the defendant's assertion on the point whether they will or will not establish the plaintiff's case. Such a statement would be one on which it would be very difficult to obtain a conviction for perjury however false it might really be. That question therefore is considered to be one on which the plaintiff has a right to the opportunity of



judging for himself." In this case the documents in dispute were documents relating to a business in respect of which the plaintiff claimed to be a partner with the defendant: the defendant denied that the plaintiff was a partner, asserted that he was a lender only, and claimed protection for the documents as not tending to show any agreement for a partnership. On the above grounds, and also the plaintiff not being a mere stranger, production was ordered of all of them except such parts as the judge clearly saw to have no bearing on the issue, that was to say money items in the accounts.

See *Harris v. Harris*, cited *post*, p. 507: and *Ferrier v. Atwood*, cited *post*, p. 507: cases of a somewhat similar character.

In *Turney v. Bayley*, 12 W. R. 633, a suit for partnership account, the defendant, denying the plaintiff's title to an account, admitted in his affidavit of documents the possession of the business documents having reference to the circumstances in question, but objected to produce them on that ground and also on the ground that the plaintiff had expressly deprived himself of any right to see the accounts (as to this point see *post*, p. 309): and it was held that the statements were sufficient to exclude the plaintiff's right to inspect the documents at that stage of the proceedings, for they would not assist him towards establishing his title to account, though at the hearing it might be necessary for the purpose of deciding some particular point to direct production and inspection to a limited or not limited extent and to order the cause to stand over for such inspection: see *post*, p. 309, as to what was done on the hearing.

In *Bannatyne v. Leader*, 10 Sim. 230, a suit to set aside the sale of a partnership, the defendant denying the right of the plaintiffs to set it aside would have been protected from producing the business documents admitted to relate to the matters mentioned in the bill if he had positively (he had only sworn that, as he believed, thereby the truth of the matters stated in the bill would not appear, but *qu.* as to the sufficiency of such an assertion however positively made: see *Goodall v. Little*, 1 Sim. N. S. p. 162, and *post*, p. 487: and see as to the necessity of a positive assertion at least of belief in the case of documents exclusively evidencing or relating to the party's own case or title, *post*, p. 502) sworn that they did not contain that which would make out the plaintiff's case. See also *Goodall v. Little*.

A person claiming to be a creditor of a testator and charging possession by the executor of the testator's papers whereby it would appear that he was a creditor would not be entitled to see them if the executor denied that he was a creditor and that the papers would make it out, though it might be fallacious and the papers would make it out: see Shadwell, V. C. *Bannatyne v. Leader*, p. 235.

Where a party sues as representative of one of next of kin of an intestate against the administrator and other next of kin, and his title is not admitted, he is not entitled to the production of documents which the defendant merely admits to be in his possession and to relate to the intestate's affairs: Shadwell, V. C. in *Edwards v. Jones*, 13 Sim. p. 638. This case was reversed 1 Ph. 501 on the ground that it was different from *Adams v. Fisher*, cited *ante*, p. 31, where the plaintiff's title was denied and the documents were not relevant to that issue, for that here the defendant only stated his ignorance whether the fact on which the plaintiff's claim depended was as stated or not, and it was consistent with his admissions that the documents might relate to the plaintiff's title. See also *Rigby v. Rigby*, 10 Jur. 126.

In *Smith v. Dowling*, 10 Jur. 63, a person claiming to be entitled in remainder under a settlement as son of a deceased tenant for life brought an action against the trustees in respect of breaches of trust. In their answer they admitted the possession of documents relating to the estate of the deceased tenant for life, and stated their ignorance whether the plaintiff was a son or not. Production was refused on the ground that there was no admission that the documents related to the plaintiff's title, and that he must first prove his title as son. And see *McHardy v. Hitchcock*, 11 Beav. 73.

In *Kettlewell v. Barstow*, L. R. 7 Ch. 686, an equitable suit of ejectment, the defendant scheduled certain documents of which the bulk were title deeds, but objected to produce them as not relating to any issue or matter to be tried at the hearing and consisting exclusively of documents to production of which the plaintiff would be entitled by way of consequential relief. They were held protected, for (p. 693) they had sworn positively that they did not relate to anything which had to be decided at the hearing. See also *Wright v. Vernon*, 1 Dr. p. 350: and *Lyell v. Kennedy*, 8 App. Cas. p. 229.

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(d) *Miscellaneous.*

Where documents are scheduled in the affidavit as being relevant it is assumed that they are relevant in some way to the matters in question: *Greenwood v. Greenwood*, 6 W. R. p. 119; and it cannot be said afterwards that they are immaterial: *Plumley v. Horrell*, W. N. 68, p. 240: except as regards the actual determination of the issues or one of them: see *Bulman v. Young* (cited *post*, p. 504) where this point was lost sight of.

The admission of relevancy must be to the matters in question at the time of the application for production. Therefore if the pleadings have been amended since the admission and either the matters in question altered or some of them expunged by the amendment, such an admission is not available as a foundation for an order for production: see *Haverfield v. Pyman*, 2 Phil. 202: and *Reynell v. Sprye*, 11 Beav. 618, where the case was not varied: and see *A. G. v. Thompson*, 8 Ha. p. 118.

That a document related to the matters mentioned in the bill (of discovery) was held insufficient to order production, for the question was whether they referred to the contract the subject of the action at law: *Peile v. Stoddart*, cited *post*, p. 485.

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IX. *Possession or Power for the purpose of Production* (see *post*, p. 224, as to *Possession or Power for the purpose of the Affidavit*).

(a) *As to Admission of Possession.*

An order for production cannot be made against a party except on his own (but see p. 195) admission of possession: evidence cannot be given to prove possession: see *ante*, p. 153. Where the party who has made the admission is dead no order can be made against his representatives without a fresh admission from them: *Scott v. Wheeler*, cited *post*, p. 200.

The admission of possession was necessary lest he should be ordered to do that which he might not be able to do: Lord Eldon in *Princess of Wales v. Liverpool*, 1 Sw. p. 123: and see *post*, p. 196, as to joint possession.

A mere reference to or description of a document was not an admission of possession: see *post*, p. 256; but see *post*, p. 245, as to the practice in respect of documents referred to in a party's pleadings or affidavits under rule 15.

For the purpose of ascertaining whether there is an admission of possession and the kind of possession admitted the whole statement of the party will be looked at and not a single detached passage: *Reid v. Langlois*, 1 M. & G. p. 636: *Kearsley v. Phillips*, 10 Q. B. D. p. 39.

Where the party denied possession but stated facts which showed that the documents were in his possession production was ordered: *Farquharson v. Balfour*, T. & R. pp. 190—191.

A party would according to chancery practice be allowed to file an affidavit to correct an admission of possession: *Morrice v. Swabey*, 2 Beav. 500, where the facts alleged in the answer showed that probably the documents were not in his possession: and see *Burbridge v. Robinson*, 2 M. & G. p. 246, cited *post*, p. 193: *qu.* as to *Plant v. Kendrick*, L. R. 10 C. P. 692, where the court refused to allow a party to set up that other persons were jointly interested in documents of which he had admitted possession in answer to interrogatories.

The documents must be in his possession at the time: an

order for production cannot be made upon an admission that the documents have been in his possession: *Heeman v. Midland*, 4 Madd. 391.

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(b) *As to Parting with Possession.*

After an order for production (including therefore the common order for production in chancery, that is to say the combined order for the affidavit and production, see *ante*, p. 154 : see as to the order for the affidavit at common law, *post*) the party is not at liberty to part with the possession of the documents comprised in that order, that is to say he can be committed for disobedience if he is unable to produce them. Where after an order for production had been made the plaintiff had been shown at the defendant's office a letter book inspection of which was refused until counsel's opinion had been taken, and the defendant subsequently asserted that he had taken it into the country and lost it, attachment was ordered against him, the only question being whether the plaintiff had not waived the benefit of the order for production by going to the defendant's office: *Mornington v. Keane*, 4 W. R. 793.

Nor can he after such an order mutilate them or remove any parts or without the sanction of the court seal up or otherwise conceal any part of them: the whole must be produced in their integrity: *Ayres v. Lery*, 19 L. T. 8: Dan. Ch. Pr. 1681: and see *post*, p. 237, as to sealing or covering up documents. Where some leaves had been torn out of a book after an order for its production had been made, and the party made an affidavit which contained no clear assertion by him of their non-existence, or that he did not know where they were, an order was made for their production; but the party might have been proceeded against for disobedience to the original order: *Farrer v. Hutchinson*, 3 Y. & C. 692.

But a party who is ordered merely to make the affidavit, as in the common law division, see *ante*, p. 154, disobeys no order by afterwards parting with the possession of any docu-

ments disclosed therein or by mutilating tearing out or covering up any portion of them though the court would undoubtedly deal with such a case as it should deserve.

Where a defendant had in his answer admitted possession of certain documents (bills of exchange impeached in the suit) and afterwards stated in an affidavit that he had since putting in his answer parted with them to his co-defendant as a security for money due, Lord Cottenham refused an order for production in the latter's absence: *Burbridge v. Robinson*, 2 M. & G. 244: but see *Plant v. Kendrick* cited *ante*, p. 191.

There is no obligation on a party to keep all the relevant documents in his possession post litem motam. But where an accounting party destroys his books or other documents before and still more pending litigation, the court will presume everything most unfavourable to him consistent with the established facts: *Gray v. Haig*, 20 Beav. 219.

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(c) *The meaning of Possession or Power for the purpose of Production.*

Possession or power for the purpose of founding thereon an order for production has a far narrower significance than for the purpose of inclusion in the affidavit. Many documents may have to be included in the affidavit of documents of which production cannot be ordered as not being in the party's possession or power in this more limited sense: see *Clinch v. Financial Corporation*, L. R. 2 Eq. p. 273 and *post*, p. 224. The same words "possession or power" are used both in rule 14 dealing with actual production and rule 12 dealing with the affidavit of documents: but the expression must be construed differently so as to make the practice accord with equity principles. In section 6 of 14 & 15 Vict. c. 99 (giving the power of ordering inspection at common law: see the section, Appx. Ch. II.) the expression "in the custody or under the control" was used: but there is nothing to show that any meaning attached to this expression different to that of the

words "possession or power" for the purpose of production in chancery.

Possession (or power) for the purpose of actual production (qu. whether it includes merely corporeal possession for the purpose of the affidavit: see *post*, p. 225, referring to *Reid v. Langlois*) means not corporeal possession but legal possession, a right and power to deal with them: *Reid v. Langlois*, 3 M. & G. p. 636: *Kearsley v. Phillips*, 10 Q. B. D. p. 40.

Further, the document must be in his sole legal possession: an order cannot be made against him (alone: see as to where the other person is a party *post*, p. 208) where he has only a joint legal possession with some other person (see as to the reason *post* (e)): but where it is in his sole legal or exclusive legal possession, an order will be made against him whether it is in his corporeal possession or not:\* *Reid v. Langlois*, pp. 636—637, 638: *Murray v. Walter*, Cr. & Ph. p. 125: *Taylor v. Rundell*, 1 Ph. p. 225: *Kearsley v. Phillips*, 10 Q. B. D. 36: and see *post*, as to an agent's possession.

It is no ground for resisting production that a person not before the court has an interest in the document: *Kettlewell v. Barstow*, L. R. 7 Ch. p. 693; unless it is an interest in the nature of property: see further *post*, pp. 196, 206: and, as to what is not such an interest, the cases cited *post*, pp. 201, 202.

See as to instances of the property of other persons in the documents interfering with a party's obligation to produce them *post* (g).

Documents belonging to a party are in his possession custody or power for the purpose of an order for production, although they are in some other country or on their way home: *Farquharson v. Balfour*, 1 T. & R. p. 191: and see *Gabbett v. Cavendish*, 3 Sw. 267, n.

The admitted possession or custody of the agent or some other person on behalf or under the control of the principal is for the purpose of production that of the principal: see

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\* It is otherwise in the case of a witness at common law, sole legal possession not being necessary: see Arch. Pr. p. 325: and *Crowther v. Appleby*, L. R. 9 C. P. 23.

*A. G. v. Chesterfield*, 18 Beav. p. 600 : *Morrice v. Sicabey*, 2 Beav. p. 501 : *Murray v. Walter*, 1 Cr. & Ph. p. 125 : *Reid v. Langlois*, 1 M. & G. p. 637. Documents the property of the client are in law in the client's possession or under his control if they are in fact in the custody of the client.

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194. To follow "*Kearsley v. Phillips*."

Where documents (directors' minute book and pass book) were in the actual possession of a defendant, having been left in his hands pursuant to sect. 155 of the Companies Act as liquidator of a company which had been voluntarily wound up and dissolved, an order for production might, it was held, be made against him, both in the Divisional Court and the Court of Appeal, on the ground that, whether or not he had any property in the documents, he had the absolute control of the documents, for, the company being no longer in existence, there was no person who had such a property in them as to, or could legally, give any order as to them or say he should not produce them, or for whom he could be said to hold them as agent or servant: and to some extent also (and this seems the more satisfactory ground) on the ground that, the plaintiff being a creditor of the company, and the action being brought against the directors on their guarantee of the company's debt, and the object of the inspection being to establish the company's indebtedness, the liquidator was bound to show him the documents as a person claiming to be interested therein within the meaning of the above section : *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 7 : (C. A.) 54 L. J. 495.

an opportunity of taking such proceedings against the solicitor or agent withholding them as may be necessary to vindicate his right and compel their production : *Taylor v. Rundell*, p. 225 : *Rodick v. Gandell*, p. 272 : and see *ante*, p. 135, as to



answering interrogatories seeking discovery of matter contained in documents to which the party is refused his right of access.

In some cases it might be advisable to make the agent or solicitor who refuses to deliver up the documents a party: see *Fenwick v. Reed*, 1 Mer. pp. 123—124: *Bond v. Northover*, 1 Y. & C. 221: and see *ante*, p. 44.

An order for production cannot be made on the solicitor (nor on any person not a party to the action: see *Hadley v. MacDougall*, L. R. 7 Ch. p. 313, and see *ante*, p. 39) unless he be made a party: *Busk v. Lewis*, 6 Madd. 29 (where it was suggested that the solicitor who in this case claimed a lien should be called as witness and a subp. duc. tec. served upon him): *Cashin v. Craddock*, 2 Ch. D. 140.

See as to a solicitor's lien *post*, p. 203.

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(e) *As to the reasons for not ordering a Party alone to produce Documents in which other Persons have a Property.*

The reason why the court will not make an order for production against a party who has only a joint possession with another person not before the court is that a party will not be ordered to do that which he cannot or may not be able to do: *Taylor v. Rundell*, Cr. & Ph. p. 111: *Kettlewell v. Barstow*, L. R. 7 Ch. p. 693: *Penny v. Goode*, 1 Dr. 474. Another reason is that another party not present has an interest (of the nature of property, see *ante*, p. 194, referring to *Kettlewell v. Barstow*) in the document which the court cannot deal with: *Taylor v. Rundell*, p. 111.

Where documents are stated to be in the possession of A., B., and C., you cannot order that A shall produce them: and that for the best possible reason that he could not produce them. . . . : He is not the proprietor: Lord Cottenham in *Murray v. Walter*, 1 Cr. & Ph. pp. 124—125: not even if they are in the corporeal possession of A.: see *Kearsley v. Phillips*, 10 Q. B. D. p. 40.

It is not that the party has a right or privilege to resist

production but that he is unable to produce: *Taylor v. Rundell*, Cr. & Ph. pp. 111, 113.

The decision in *Walburn v. Ingilby* cited *post*, p. 209 (and see the explanation there suggested), which, as reported, infringes on this rule has been expressly disapproved: see *Murray v. Walter*, 1 Cr. & Ph. p. 125: *Kearsley v. Phillips*, 10 Q. B. D. p. 41. In *Walburn v. Ingilby*, p. 83, Lord Brougham considered that the court had a right to give whatever access the party himself had.

So with respect to documents in which the party has no property at all.

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(f) *As to the obligation of the Party in reference to Documents in which other Persons have a property.*

Where the documents are not in the party's sole legal possession (even if they are in his actual corporeal possession: *Kearsley v. Phillips*) he is under no obligation to try and procure the assent of the other persons having a joint property in the documents to their production: it is sufficient for him to state the fact (and the names and nature, see *post*) of joint possession, for there is no right as against him to production and inspection of documents which are not in his sole legal possession but only jointly with another person not a party (see as to the case where the other person is a party *post*, p. 208): it is not necessary to allege or show the refusal of the co-owner: *Kearsley v. Phillips*, 10 Q. B. D. 36: affirmed 465 (and see in particular pp. 466, 467) following *Murray v. Walter*, Cr. & Ph. 114, where it did not appear that any steps had been taken to procure the assent of the co-owners: so also in *Penny v. Goode*, 1 Dr. 474: and *Reid v. Langlois*, 1 M. & G. 627: but see *Hadley v. McDougall*, L. R. 7 Ch. 312 where the refusal of the co-owners was stated: and *A. G. v. Wilson*, 9 Sim. 536 where production was sought of a witness. In *Stuart v. Bute*, 11 Sim. p. 452, Shadwell, V. C. considered that the same obligation rested on the party to try and get the co-owner's assent to production where production was

required, as where the party only desired inspection for himself in order to answer his adversaries' interrogatories, and that therefore as in answering interrogatories (see *ante*, p. 135) a physical impossibility must be shown.

So also with respect to documents in which the party has no property at all.

Application may it is conceived be made by the party seeking production for the consent of the co-proprietors: see *Edmunds v. Foley*, cited *post*, p. 201.

Where the party is prevented from producing documents by the interests of other persons in them, the only course is to make those other persons parties, or to get discovery of their contents (see *ante*, p. 135), and production of the originals at the hearing by a subp. duc. tec.: *Hadley v. McDougall*, L. R. 7 Ch. p. 313: *Kearsley v. Phillips*, 10 Q. B. D. p. 37: *Lopez v. Deacon*, 6 Beav. p. 258: *Sweet v. Hunter*, cited *post*, p. 201: an order for production cannot be made upon a person who is not a party: *Hadley v. McDougall*, p. 313: and see *ante*, p. 196.

But the names of the persons who have any property in the documents must be given, and also the nature of the joint (or sole) ownership shown: *Borill v. Cowan*, L. R. 5 Ch. 495: and see *Murray v. Walter*, Cr. & Ph. 114 where the names were given: *Kettlewell v. Barstow*, L. R. 7 Ch. 686 (where both the names were given and the nature of the interests of the persons in the documents, but they were not interests equivalent to property, see *ante*, p. 194): and see *ante*, pp. 19, 182, as to the object of this discovery, and *post*, pp. 224, 227, as to the purpose of the affidavit of documents.

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(g) *Instances of the Rule (see ante (c)) that an Order cannot be made against a Party alone to produce Documents in which he has a Joint Property with other Persons or no Property at all.*

See as to copies *post*, pp. 206—207.

One partner cannot be ordered to produce the partnership

documents: *Reid v. Langlois*, 1 M. & G. p. 627: *Hadley v. McDougall*, L. R. 7 Ch. 312. Where the absent partner has allowed his partner, being an executor, to mix up his executorship accounts in the partnership books it has been suggested that an order might be made: see *Freeman v. Fairlie*, 3 Mer. p. 44: but qu.: and see *Hadley v. McDougall*, where however the partner was not an executor but had entered transactions in which he was engaged with the plaintiff.

One of two trustees of a mortgage could not be ordered to produce the documents of the mortgaged property in the absence of the other who was not a party: *Kearsley v. Phillips*, 10 Q. B. D. 36: on app. 465.

The principal cannot be ordered to produce documents the property of his agent: *Reid v. Langlois*, 3 M. & G. p. 637, where the agents were a partnership of which the principal was a partner: *Airey v. Hall*, 2 D. G. & Sm. 488, where among the documents scheduled by the defendants (executors) were account books in the possession of their agent; on an affidavit by the latter stating that these books contained entries relating to the affairs of other persons by whom he was also employed, an order for their production was refused, for they were not the defendants' books.

An agent cannot be ordered to produce his principal's documents. Defendants holding certain documents as agents for and on behalf of persons formerly members of an unlawful government in Sicily would have been protected from producing them had it not been that the plaintiffs were then the legitimate government and must be deemed to have succeeded to the property in these documents: *King of Two Sicilies v. Willcox*, 1 Sim. N. S. pp. 319—320, 327.

A solicitor cannot be ordered to produce his client's documents (see an exceptional case *Fenwick v. Reed*, *post*, p. 209): see for instance *Bovill v. Cowan*, 15 W. R. 608. As a witness at common law the solicitor's objection to production of his client's documents has been treated as a question of privilege and not of property: see 1 Taylor, Evid. 411: 2 Phill. Evid. 280: and Bk. II. Ch. II, Pt. 3. In *Copeland v.*

*Watts*, 1 Stark. 95 a solicitor as witness was ordered to produce an underlease belonging to his client in favour of the superior landlord, the judge being of opinion on inspection that its production would not prejudice the client.

A steward's possession of leases &c. was treated as the possession of his employer and therefore not affected by a subp. duc. tec.: *Falmouth v. Moss*, 11 Pri. pp. 456—457.

Where the solicitor or agent holds the documents on behalf of other persons besides the party of whom production is sought, no order for production can be made: see *Murray v. Walter*, Cr. & Ph. pp. 124—125: and cases *post*.

Trustees and treasurers of an insurance society could not have been compelled to produce documents which were at the society's office but not otherwise in their possession, it not appearing that they had any power to take them out of the custody of the general body of directors: *Penny v. Goode*, 1 Dr. 474, where further they had ceased to be trustees and treasurers: nor directors of a company documents in the possession of their solicitor as solicitor for the company: *Cridland v. De Mauley*, 13 Jur. 442: and see *Crowther v. Appleby*, L. R. 9 C. P. 23: and *Gaskell v. Chambers* cited *post*, p. 209.

Where two defendants had admitted joint possession and one subsequently died, an order for production on the survivor was refused in the absence of the representatives of the other: *Robertson v. Sherwell*, 15 Beav. 277: nor it seems could an order have been made without a fresh admission from the representatives: see *Scott v. Wheeler*, 12 Beav. 366.

Where two defendants put in a joint answer and admitted documents in the possession of one of them an order could not be made against him without serving notice of the application on the other: *Smith v. Sidney*, 6 Jur. 432.

An order for production cannot be made against a lunatic's committee of deeds in the custody of the court having jurisdiction in lunacy, for they are not in his possession or control: *Vivian v. Little*, 11 Q. B. D. 370.

Where production is sought of a testator's documents it seems that the assent of the executor should be obtained: see *Doe d. Marriott v. Hertford*, 19 L. J. Q. B. 526: *Gresley v.*

*Mousley*, 2 K. & J. 288 : (see an exception *Feaver v. Williams*, cited *post*, p. 355) : and perhaps also of the heir where the documents relate to real estate sold by the testator but are not muniments of title so as to pass with the property, for instance maps : see *Doe d. Marriott v. Hertford*.

Qu. whether production could be ordered where the right to legal possession is in dispute between the party having corporeal possession and other persons : see *Campbell v. Dalhousie*, 22 L. T. 879.

The following are miscellaneous cases :—

*Lopez v. Deacon*, 6 Beav. 254 : documents in the possession of the captain of a mine on behalf of the defendant and co-adventurers not parties in a suit by lessor against lessee ; *Murray v. Walter*, 1 Cr. & Ph. 114 : 3 Jur. 719 : documents in possession of treasurer of a concern (Times newspaper) in which other persons not parties were interested ; *Edmunds v. Foley*, 30 Beav. 282 : suit dealing with a moiety of property, deeds relating to the whole property in the custody of the solicitor of the defendant and of the owner of the other moiety not a party ; *Morrell v. Wootton*, 13 Beav. 105 : documents in joint possession of defendant and his co-executor not a party, or of their solicitor ; *Palmer v. Wright*, 10 Beav. 234 : documents sworn not to be in the party's possession power or control but in possession of his solicitors as successors to the solicitors of a testator and of his executors, the party being executor of one of these executors ; *Sweet v. Hunter*, 9 Jur. 807 : documents in the hands of a party agent to persons not parties ; *Bayley v. Cass*, 10 W. R. 370 : testator's drafts in banker's custody referred to in an affidavit of the banker who was not a party, and apparently no admission by the party himself an executor.

Qu. whether the absence of remaindermen is any objection to production by a tenant for life : see *Dundas v. Blake*, 10 Ir. Eq. R. pp. 263—264, where (overruling *ibid.* 9 *ibid.* 640) it was held no objection to production of a document referred to in the answer and falling within the doctrine of *Hardman v. Ellames* (see *post*, p. 251) : and *Murphy v. Balfe*, 1 Ir. Jur. 218, following *Dundas v. Blake* ; qu. that is to say whether their interest is an interest of the nature of property, see *ante*, p. 194. It is conceived that it is not such an interest. Nor are many of the various interests the subject of Chap. VII. *post*, interests of such a nature. See however *Bugden v. Tylee* there cited p. 273, where the interest of a settlor seems to have been regarded as such an interest.

In *Warrick v. Queen's College*, L. R. 4 Eq. 254 (and see *ibid.* 36 L. J. Ch. 505, at an earlier stage) the principle was carried to the extent of protecting defendants (lords of a manor) from producing documents relating to the compromise

of a dispute between themselves and a person not a party to the action in respect of certain rights claimed by him against the manor of a similar character to those claimed in the present action. This decision seems questionable. The documents were the property of the defendant: and the other persons had only an interest in their contents and no property (see *ante*, p. 201) in the documents themselves. In *Hutchinson v. Glover*, 1 Q. B. D. 138: affirmed 33 L. T. 834 (see *ante*, p. 185), an order was made on the defendants for production of documents embodying a compromise arrived at between them and other persons in another action. There are observations by Blackburn, J. which seem to show that he considered that these other persons might have objected to their production but had not done so. It does not however appear that these other persons had any property in the documents: if they had, of course no order could have been made for production in their absence: see *Kearsley v. Phillips*, 10 Q. B. D. pp. 37, 43.

As to the right of a trustee or person having a representative character to produce documents in the absence of the cestuis que trusts or persons whom he represents.

A trustee as a general rule cannot be ordered to produce documents relating to the trust property in the absence of the cestuis que trusts: *Ford v. Dolphin*, 1 Dr. p. 223: (as to his disclosing the contents of the documents see *post*, pp. 302, 304). This was a suit brought by a creditor of the settlor to impeach a deed settling property on his wife, and an order on the trustee for its production (and of the solicitor's bill of costs in preparing it) was refused in the absence of mortgagees under a power of appointment in the deed by the wife, though if the plaintiff had been the only person who could impeach it and therefore had been in a position to confirm the appointment, it seems an order would have been made.

But where an action is brought by a trustee for the benefit of and by the direction of the cestuis que trusts he is bound (in answer to a bill of discovery, for they cannot, see *ante*, p. 40 n. be made parties to the bill; but qu. whether not on the general principle) to produce everything in his possession or power as such trustee to the same extent as if he had not only the legal but also the beneficial interest: *Few v. Guppy*, 13 Beav. 457, pp. 471—472. Nor does it make any difference where as in this case the trustee is also the solicitor of the trust; for in whatever capacity he holds the documents, as for the purpose of the action he represents the parties beneficially interested. See also *Kearsley v. Phillips*, 10 Q. B. D. 36, where apparently if both trustees had been before the court production would have been ordered.

In other cases although persons not before the court have had some property in the documents production has been ordered on the ground that the parties, on whom the order was made and having actual corporeal possession of the documents, were sued in a representative character or might be regarded for the purpose of the litigation as the representatives of these other persons who had no interest distinct from theirs. The interests of



members of a club: *Richardson v. Hastings*, 7 Beav. 354 (they not being necessary parties): and of shareholders and directors of a company: *Glyn v. Caulfield*, 3 M. & G. 463, (the defendants being shareholders and agents appointed to wind up the company with full powers for that purpose), referred to and not disapproved in *Penny v. Goode*, 17 Jur. p. 83: have been disregarded on this ground. So the secretary of the Board of Trade having accepted the action in his official capacity has been regarded as representing the Board of Trade quâ the production of documents belonging to that department: *Kain v. Farrer*, 37 L. T. 469. So the public officer of a joint stock banking company was held to represent it even after dissolution, and therefore an order for production of documents scheduled by him as being in the possession of the directors and the solicitors of the company might be made against him: *Hall v. Connell*, 3 Y. & C. 707.

As to a mortgagee's right to produce his mortgagor's documents of title.

A mortgagee has no right to produce his mortgagor's documents of title: *Lambert v. Rogers*, 2 Mer. 490. Therefore where a tenant in common had assigned his share and then became mortgagee of it, the other tenant in common could not compel him to produce the deeds in his possession as mortgagee: *ibid.* (But qu. whether there might not be an exception where the applicant has a property in the documents see *post*, p. 272.) See also *Lockett v. Cary*, cited *post*, p. 205.

The decision in *Balls v. Margrave*, 3 Beav. 448 and 4 Beav. 119 where a mortgagee was ordered to produce his mortgagor's documents of title in answer to a bill of discovery, was rested on the special ground that the mortgagor not being a party to the action at law could not be made a party to the bill of discovery. Here also it may be noted that the action was by a lessor upon the covenant for payment of rent in the lease the subject of the mortgage, and that the documents in question were the mortgage and the lease of which there was no counterpart, and as to the latter at all events production could have been had under the common law equitable jurisdiction: see *post*, p. 264.

Where the mortgagee is a trustee of the mortgage the persons beneficially interested have a right to see the documents: *Gough v. Offley*, 5 D. G. & Sm. 653. In this case, an administration action, the trustees and executors were compelled to produce the deeds relating to the property on mortgage of which the trust funds were invested, although some of the mortgagors not only refused their consent but stated that they would rather pay off the debt than have their title seen (the husband of the plaintiff beneficiary being a local attorney), and although the parties to and dates of the mortgages and the value of the property comprised therein and the amounts of the mortgages and rates of interest had all been set out.

Where a mortgagee has copies of the documents of title relating to the mortgaged property and does not say that he holds them as trustee for the mortgagor they must be produced: *Hercy v. Ferrers*, 4 Beav. 97. This is a good illustration of the difference between discovery and production of documents in which other persons have some property, see *ante*, p. 135, and *post*, p. 305: and see as to copies *post*, p. 206.

As to the lien of a solicitor or other persons:—

(1) Where the client or person against whom the lien is claimed is called on to produce:

(2) Where the solicitor or person who claims the lien is called on to produce. (This point is considered here as a

matter of convenience though it has obviously nothing to do with the subject of this sub-section (g)).

**(1.) Where the Client &c. is called on to Produce.**

The order for production of a document will be made on the client even if his solicitor claims a lien upon it: *Vale v. Oppert*, L. R. 10 Ch. 340: *Rodick v. Gandell*, 10 Beav. 270: and see *McCann v. Beere*, 1 Hogan, 129.

Lord Redesdale gave as his reason for making such an order that if the client was bound to produce the document for the benefit of a third person, so also must the solicitor, and that his lien was only good as between himself and his client: *Furlong v. Howard*, 2 Sch. & Lef. 115. But the rule laid down by Lord Eldon in *Ex parte Shaw*, Jac. 270, and approved by James, L. J. in *Vale v. Oppert*, p. 341, was that if the party could not produce them without paying his solicitor's bill of costs he must do so, thus apparently admitting to some extent at all events the validity of his lien under such circumstances. And *Ex parte Shaw* was followed in *Goodcheap v. Waring*, 16 Jur. 586, the party being there a trustee: and see *Monsel v. Lindsay*, 13 Ir. Eq. R. 144, where the personal representative of the solicitor claimed a lien. In *Ley v. Barlow*, 1 Exch. 800, where an order for inspection was made on clients under the common law equitable jurisdiction (see *post*, p. 267), it seems to have been considered that the solicitors could not set up their lien under such circumstances, apparently by analogy to cases where a solicitor as witness was not allowed to set up his own lien; but qu. whether different considerations are not involved in such cases: see *post*, p. 205.

In *Kettlewell v. Barstow*, 20 W. R. 621, the lien of a former solicitor for costs seems to have been treated as a reason for not ordering production.

In *Vale v. Oppert* the defendant had changed his solicitors in the suit, and the lien was claimed by the former solicitors: and James, L. J. considered that if in such a case no order were made, a party would use that machinery to escape production: *ibid.* p. 342.

But where the party is bankrupt and cannot discharge the lien liberty will be given him to apply if he is unable to get production, and no attachment would have been issued against him under the old practice without the leave of the court: *Vale v. Oppert*: and see *Rodick v. Gandell*, p. 272, where it was said further that the bankrupt must if he found a difficulty come to the court to give him an opportunity of taking proceedings to compel production from the solicitor (as in the ordinary case where an agent wrongly withholds a document, see *ante*, p. 195. In such a case the party must make more than a formal application to his solicitor for them: he must satisfy the court that he has done his best to comply with the order: James, L. J. in *Vale v. Oppert*, p. 342.

Where the client is a trustee (and so no doubt in any case) time will be given for him to discharge the lien: *Goodcheap v. Waring*, 16 Jur. 586.

Where the defendants represented a company and admitted documents in their power, and the solicitors to the company, one of whom was a defendant, claimed a lien upon them for certain costs, Knight-Bruce, V. C. considered that he was not at liberty to order them to discharge the lien for the purpose of facilitating production: *Wroughton v. Barclay*, 11 Jur. 274.

The solicitor cannot set up his lien acquired in the cause against the right of the other parties in the cause to production: James, L. J. in *Vale v. Oppert*, p. 342: and see *Belaney v. French*, *post*.

In *Re Williams*, 30 L. J. Ch. 610, it was held that a solicitor who had been committed for disobedience to an order for delivery up of all documents in his possession or power must be discharged, for the documents were in the possession of counsel and of a law stationer who claimed a lien for unpaid fees or charges and he had no money of his clients to pay them with.

In *North v. Huber*, 29 Beav. 437, the defendant, having been committed for contempt for non-production of documents admitted by his affidavit to be in his possession or power, was discharged on the ground that prior to the suit the documents were in the possession of auctioneers who claimed a lien on them which the defendant was unable to discharge, following *Re Williams, ante*.

Where the documents are pledged there is no obligation on the party called upon for production to redeem them: *Liddell v. Norton*, Kay, App. 11.

**(2) Where the Solicitor, &c. (see ante, p. 203), is called on to Produce.**

Where the solicitor (or person claiming the lien) is the person from whom production is required different considerations have a place. It is his duty that has to be considered, not the client's duty to discharge the lien: see *Hope v. Liddell*, 7 D. G. M. & G. p. 338.

As witness the solicitor cannot set up his lien so as to refuse production under a subp. duc. tec. (see *Hope v. Liddell* distinguishing it from delivery) except to the persons who created the lien or persons claiming under them: *Hope v. Liddell*, 20 Beav. 438, affirmed 7 D. G. M. & G. 331 (distinguishing it from the case of a mortgagee and citing, pp. 338—339, *Doe d. Gilbert v. Ross*, 7 M. & W. pp. 121—122: and *Griffith v. Rickett*, 7 Ha. p. 303): *Re Cameron's Coalbrook &c. Co.* 25 Beav. p. 4 (see this case *post*, p. 209): *Re Gregson*, 26 Beav. 87, where the trustee of a marriage settlement was regarded as claiming under the settlor against whom the lien arose: *Brassington v. Brassington*, 1 S. & S. 455, a suit by the wife of the settlor to enforce the settlement against her husband, where the lien for the costs of the settlement was held not good to defeat her right to production: *Thompson v. Moseley*, 5 C. & P. 501: *Doe d. Kemp v. King*, 2 M. & R. 437: C. & M. 396: *In re South Essex &c. Co.* L. R. 4 Ch. p. 216.

Where a solicitor as party (and so any person litigating with a person against whom he claims a lien: *Brougham v. Cauvin*, 16 W. R. 688: see as to the special privileges of a mortgagee, Bk. II. Ch. IV. Sec. 3) is litigating with his client it is conceived that in no case is his lien any ground for refusing production. The lien remains notwithstanding the production: *ibid.* p. 688. Lord Romilly drew a distinction between inspection and taking copies in such a case, refusing to a party claiming through the client liberty to take copies but allowing him inspection: *Lockett v. Cary*, 10 Jur. N. S. 144: but *qu.* as to the soundness of the distinction see *ante* p. 174. In this case documents held by the solicitors as mortgagees from the client were protected: see as to this, *ante*, p. 203.

The following were laid down as instances where the solicitor could not set up his lien to refuse production to the client by Lord Eldon in *Balch v. Symes*, T. & R. p. 92: where the client executes a deed in favour of his solicitor and reserves to himself a life interest and power of revocation, a will, where the client seeks to impeach a deed conveying his property to his solicitor, for the object of the suit is that it may be declared a nullity: see further as to this last point and the stage of production, *post*, p. 258.

Where a solicitor receives documents pending proceedings for a winding-up order or pending or for the purpose of an administration suit he cannot by virtue of his lien refuse to produce the documents for the purpose of the liquidation or suit, for he takes them knowing that they will be required for that purpose and that other persons are interested besides the persons who put them into his hands: see Cotton, L. J. in *Re Capital Fire Insurance Association*, 24 Ch. D. pp. 419—420, explaining *Belaney v. French*, L. R. 8 Ch. 918: and *Boughton v. Boughton*, 23 Ch. D. 169: and see *Re South Essex, &c. Co.* L. R. 4 Ch. 215: *Baker v. Henderson*, 4 Sim. 27: *Warburton v. Edge*, 9 Sim. 598: *Re Faithfull*, L. R. 6 Eq. 325. A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the court and cannot use that means of obtaining payment: *Belamy v. French*, p. 920. But as to documents come into his hands before the suit

or liquidation his lien remains: *Re Capital, &c. Association*, p. 421. These were not cases of discovery: orders were made for delivery up without prejudice to the solicitor's lien. It was said in *Belamy v. French*, p. 920, that if there had been an express charge it might have been different.

In bankruptcy it seems that his lien even if arising out of matters before the bankruptcy is no ground for his refusing to produce the documents for the trustee's inspection: *Re Toleman*, 13 Ch. D. 885: *Ex parte Parsons*, 19 W. R. 235: *Ex parte Caldecot*, Mont. 55: and see *post*, Bk. III. Ch. V. Sec. 2.

As to letters and other documents communicated or entrusted to the party in confidence, and copies of them.

It is laid down *post*, p. 302, as a general principle of discovery that the mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from a voluntary disclosure out of court. It follows from this that (1) the mere fact that a third person not before the court has any property in a document is no protection against disclosing its contents either in answer to interrogatories or by production of a copy (if it be the sole and absolute property of the party, see *post*, p. 207, and *ante*, p. 203): see *ante*, p. 135, and *post*, p. 305: (2) that the mere fact that a third person not before the court has an interest in the matter of a document without having any property in the document itself is no protection against producing it, see *ante*, p. 194.

The receiver and possessor of a letter cannot refuse production of it or copies of it in a court of justice for the purposes of public justice: *Hopkinson v. Burghley*, L. R. 2 Ch. 447; *Gee v. Pritchard*, 2 Sw. p. 427; although he has only a special and not the sole property in it and is not as a rule justified in publishing it to the world without the consent of the writer, for at most he has only a joint property in it with the writer: *Gee v. Pritchard*, pp. 425—427: *Pope v. Curl*, 2 Atk. p. 342. The property of the writer is in fact rather a property in the contents of the letter than in the actual document itself: this is perhaps the sole property of the receiver: *Pope v. Curl*. So far as it might be regarded as a breach of confidence for the receiver to communicate the contents to a third person, this constitutes no objection to production or discovery for the purposes of public justice: see *post*, p. 302. In *Hopkinson v. Burghley*, an action by a member of a club against the trustees and committee, the defendants were ordered to produce a letter written to them by a stranger marked private and confidential (on an undertaking not to use the document or any copy of it for any collateral object, as in *Richardson v. Hastings*, 7 Beav. 354, and see *post*, p. 238) although the writer had expressly refused permission. "The writer of a letter trusts the receiver with the letter and he must take the consequence of its being in his possession. The question which now arises is between a stranger and the receiver. If the sender of a letter wishes to restrain the receiver from showing it to any other person, he must file a bill for that purpose. Unless that is done the property is in the receiver:" Turner, L. J. p. 448. "The question in all these cases is what was the purpose or object in the mind of the person sending the letter. The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used it is the production of it in a court of justice for the furtherance of the ends of justice. In the present case the receivers were justified in declining to produce the letters without the direction of the court: but they cannot now refuse to produce them:" Cairns, L. J. *ibid.* p. 448.

It was urged in argument in *Reynolds v. Godles*, 4 K. & J. 88 (and apparently adopted by Lord Hatherley, p. 91, though he refused to extend the

proposition to the case of a document produced for inspection upon compulsion under an order of the court, as to which see *post*, p. 239) that *Enthoven v. Cobb* (2 D. G. M. & G. 632, affirming *ibid.* 5 D. G. & Sm. 595) had established the general proposition that where a party has obtained documents from a third person in confidence and for a limited and restricted purpose he could not be compelled to divulge them (whether by production of the originals or of copies, see p. 89, or otherwise) except for that purpose. Now if it was intended to mean by "divulging" not only production of the actual document but also the divulging its contents either in answer to interrogatories or by producing a copy of the document, such copy being the sole and absolute property of the party, it is impossible to reconcile the proposition with the fundamental principle of discovery (see *post*, p. 302) that breach of confidence as against a third person is no protection against giving discovery. It is submitted that the proposition must on principle be limited to actual production, production that is to say of the document itself or of a copy of it made under such circumstances that it is not solely and absolutely the party's own property. As thus limited it is in harmony with general principles. For it rests not on confidence but on property. The third person so lending a document or allowing a copy to be made intends to retain his property in the document or to possess an interest of the nature of property in the copy: and therefore production cannot be ordered in his absence. Nor does the decision in *Enthoven v. Cobb*, or the judgment of Knight Bruce, L. J. on appeal, when carefully examined warrant any extension of the proposition beyond what can be supported on such a basis. In this case the plaintiff had procured from H. and H. third persons, on an implied if not on an express understanding with them that he might take copies and use them for the purpose of his suit but not otherwise or to their prejudice, a case and opinion taken by them for the purpose of litigation against the same defendant on substantially the same matters. Production of the copy so made was refused: by Parker, V.-C. on two grounds, one that the case of H. and H. being a common case with that of the plaintiff it was in substance a confidential communication between the plaintiff and his legal adviser (see as to this *post*, p. 366), the other on the ground of the interest of H. and H. in the document. The grounds of the decision in the Court of Appeal are best explained by the following extracts from the judgment of Knight Bruce, L. J. p. 634. "Now the first question is for what purpose, with what view, upon the materials before us we ought to infer that the case and opinion were communicated with permission to copy them. In my opinion the just and inevitable inference is that the communication was not made for the purpose of allowing unlimited publication and use but was made in confidence for the limited and restricted purpose of assisting them in that claim, which was for every substantial purpose common with that of the ladies whose solicitor lent it to them. I infer therefore from the materials before the court that it would be an unjust and unlawful act on the part of the present defendants to allow that case and opinion, or a copy of it which is the same thing, to be published or even to be communicated in any manner except for the purpose of the defence. I consider that these ladies had and still have a material interest in the document the production of which to their own adversary is sought by this application. Without entering into other questions which with propriety and ability have been discussed upon this motion it is sufficient for me to be satisfied that the interest of the ladies, their rights with respect to these documents, and the limited purpose for which the documents were communicated, do of themselves preclude all right on the part of the plaintiff to the production of the documents or discovery of their contents." No doubt there are in this passage expressions which by themselves might seem to warrant the proposition that under such circumstances the contents could not be compelled to be divulged. But the decision itself seems to have been founded upon the view that under the very special and peculiar circumstances of the case the persons must be taken to have had a material interest (that is to say an interest of the nature of property) in the actual copy. It may be



observed that the learned judge seems to have passed over the vital distinction (see *ante*, p. 206, and *post*, p. 302) between a voluntary disclosure of confidential matter out of court and a compulsory disclosure under the sanction of the court.

Qu. as to *Penkethman v. White*, 2 W. R. 380, where a party was ordered to produce documents entrusted to him by a stranger upon an undertaking to return them on demand and in the meantime not to part with the possession of them to any other person.

A defendant is not bound to enforce a covenant for production and copies of deeds for the maintenance and manifestation of his title in order to produce them or to give discovery of them or their contents to a plaintiff who is seeking to impugn his title to part (minerals) of the property claimed to be conveyed by them: and qu. whether if the covenant were used for the purpose of giving such production or discovery it would not be a fraud upon the purpose of the covenant: *Bethel v. Casson*, 1 H. & M. 806: 12 W. R. 200. But qu. whether on general principles (see *ante*, p. 206) he could refuse to discover the contents if as a matter of fact he knows them, or to produce copies if he has them and they are his sole and absolute property: see *ante*, pp. 134, 135, 138, 206.

In some cases it may be difficult to say whether certain documents are the property of the principal or agent: *Tipping v. Clarke*, 2 Ha. p. 293.

For instance books, indexes, memoranda, plans, sketches of the estate, compiled or made by stewards of manors or land agents for their own use in performing their duties: *Winchester v. Bowker*, 29 Beav. 479: *Beresford v. Driver*, 14 Beav. 387: books of account *Tipping v. Clarke*. In the first two cases documents of this kind were ordered to be produced in order that it might be seen from their nature to whom they belonged: see *ante*, p. 22.

The ordinary books journals ledgers or letter books of a solicitor are his own property: *Woodhatch v. Freeland*, 11 W. R. p. 399: and see *Flight v. Robinson*, 8 Beav. pp. 30, 40, although, see *post*, p. 227, the client may be entitled to inspect them or have extracts made from them.

Copies of the solicitor's letters to third persons were said by Lord Romilly in *Re Thomson*, 20 Beav. 547 to be the solicitor's property if not charged for: as to letters by the client to the solicitor his opinion was that the solicitor was entitled to retain them: but those to the solicitor from third persons were the client's, for the solicitor received them as his agent. But however this may be, all letters of this kind have always been treated as the client's property for the purpose of an order for production.

Bills of costs are the client's documents: see *Flight v. Robinson*, 8 Beav. p. 40.

#### (h) *Where the other Persons interested are Parties.*

Where the other persons interested are parties, no order can be made against them if they have not admitted any possession: see *Murray v. Walter*, Cr. & Ph. 114: but see *Fenwick v. Reed*, *post*.

It is conceived however that application may be made to them, and if they assent to the production, or if they disclaim

any interest in the documents, an order may be made either against the party alone or against the party jointly with them. And qu. whether the proper course is not to serve the summons for the order for production upon them: see *Cameron's Coalbrook, &c. Co.* cited *post*, p. 425: and see the cases *post*.

In *Fenwick v. Reed*, 1 Mer. 114, Lord Eldon treated the admission of possession by the party's attorney, himself a party, as an admission by the client: see pp. 120, 126. The case however was a peculiar one. See *ante*, p. 191.

In *Gaskell v. Chambers*, 26 Beav. 303, a suit by a plaintiff on behalf of the shareholders against the directors, the solicitors, other officers of the company and the company, the directors admitted documents in the possession of the defendant S. one of the solicitors to the company: Y. another of the solicitors to the company admitted possession of other documents as solicitor of the directors. A summons was taken out against the directors and Y. for production of all the documents; the company were directed to be served but did not appear. The order was made, for (p. 305) the owners of the documents did not object; the company did not appear, and the directors did not object; and Y. had no interest, for he held them for the directors whom therefore it was necessary to serve.

In *Blenkinsop v. Blenkinsop*, 2 Ph. p. 608 (see this case further *post*, p. 425), Lord Cottenham said "The Master of the Rolls cannot have meant to say that if one defendant says 'I have documents in my possession but they belong to a co-defendant' and either puts in no answer or says that he has nothing to do with them the court is to be baffled by that course of proceeding between two defendants." Qu. whether the decision in *Walburn v. Ingilby*, 1 M. & K. 79, cited *ante*, p. 209, was not partly based on grounds of this kind. There four defendants admitted possession by their solicitor on behalf of themselves and other defendants who had successfully demurred, and Lord Brougham (pp. 82—83) considered it to be a contrivance to defeat the jurisdiction of the court and avoid production, and made an order.



### X. *The Affidavit of Documents.*

See generally as to the affidavit of documents *ante*, p. 155.

As to the documents necessary to be included in it as "relating to any matter in question," see *ante*, Section VIII. sub-section (a).

As to the documents necessary to be included in it as relating to a particular matter in question if limited in that way, see *ante*, Section VIII. sub-section (b).

An affidavit of documents is either sufficient or insufficient. Where it is sufficient no further affidavit can be ordered. Where it is insufficient a further affidavit can be ordered: for the court is not restricted to requiring from a party one affidavit of documents: see *post*, p. 211, citing *Lyell v. Kennedy* and *Noel v. Noel*.

An affidavit of documents may be insufficient in four ways (1) as being discredited or inconsistent: see *post*, p. 214: (2) as not following out the proper form: see *post*, p. 221: (3) as not sufficiently identifying the documents: see *post*, p. 227: (4) as not sufficiently stating the grounds of objection to production or otherwise insufficiently claiming protection: see *post*, p. 231.

The last kind of insufficiency is obviously of a different character to the other kinds. There is no failure of compliance with any order, but a failure to satisfy the court that the documents ought not to be produced. The natural result of this failure is production: but the court in some cases allows the party to file a further affidavit for the purpose of establishing, if he can, a valid claim to protection: see further *post*, p. 231.

Whenever the affidavit is conceived to be insufficient in any of the first three ways above the proper mode of raising the question is to take out a summons to consider the sufficiency, and if the affidavit is held insufficient the party is deemed not to have complied with the order directing it to be made and technically could be proceeded against for disobedience to such order; but the court will as a rule (but see *post*, p. 219) order a further affidavit to be made: Dan. Ch. Pr. p. 1680.

[The reference on the preceding page to *Lyell v. Kennedy* should be p. 215.]

(a) *The conclusive Character of the Affidavit of Documents generally, and in particular as to Non-Possession and Non-Relevancy.*

No order for production can be made against a party unless he has directly or indirectly admitted possession: see *post*, p. 191: and relevancy: see *ante*, p. 181.

A further affidavit of document can be ordered only under the circumstances considered *post*, p. 215.

Interrogatories for this purpose can only be administered under the circumstances considered *post*, p. 213.

A party cannot be cross-examined upon his affidavit of documents (but see after decree *Pickering v. Pickering*, *post*, p. 236), nor can evidence be adduced to contradict it: *Wright v. Pitt*, L. R. 3 Ch. p. 810: *Newall v. Telegraph Construction Co.* L. R. 2 Eq. p. 762: *Manby v. Bewicke* (2), 8 D. G. M. & G. 470 (overruling *Kay v. Smith*, 20 Beav. 566): *Underwood v. Sec. for India*, 12 Jur. N. S. 321 (where it was sought to show that a document sworn to be confidential was not so: see *post*, p. 231); *Westminster, &c. Colliery Co. v. Clayton*, 12 W. R. 123: *Ross v. Dublin, &c. R. Co.* 8 L. R. Ir. Q. B. C. P. & Ex. Div. 213: *Jones v. Montevideo Gas Co.* *post*: *Hall v. Truman*, *post*, p. 213: *Lyell v. Kennedy*, 27 Ch. D. p. 20: not even where the fraudulent omission of a document is alleged: *Reynell v. Sprye*, 1 D. G. M. & G. 656: nor will an affidavit in contradiction be received,\* even where the party has chosen to reply to it: *Reynell v. Sprye*: and see *Ross v. Dublin, &c. R. Co.* at pp. 214, 215. These cases were, with the exception of *Underwood v. Sec. for India* and *Lyell v. Kennedy*, all cases where the question was as to the suggested omission of relevant documents: but the principles

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\* It was permissible to verify a document stated in the bill and neither admitted nor denied on a motion for production of other documents: see *Addis v. Campbell*, *post*, p. 262: *Edwards v. Jones*, 1 Ph. 501: but not to verify a fact: *ibid.*

are applicable to any statements in the affidavit which are regarded (whether in reality so or not, see *post*, p. 489) as statements of fact. In all questions of discovery the oath of the party giving the discovery is conclusive as against the oath of the party requiring the discovery: see Cotton, L. J. in *Lyell v. Kennedy*, p. 19. Evidence cannot be given to prove possession, see *ante*, p. 191: or relevancy, *ante*, p. 181.

“Either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit, but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shown by a contentious affidavit that the affidavit of documents is insufficient. This was the practice observed in the Court of Chancery and the orders and rules under the Judicature Act were made in imitation of it. It may be urged that a party seeking production may be injured by the wrongful withholding of a document and that an affidavit in contradiction ought to be admitted under supervision. But this mode of proceeding cannot be allowed: the affidavit of documents must be accepted as conclusive.” Brett, M. R. in *Jones v. Montevideo Gas Co.* 5 Q. B. D. p. 558. In order to support a summons for a further affidavit of documents on the ground that the party has not set out in his affidavit all the documents which he ought to have set out, the adversary cannot file a contentious affidavit or be heard to say that he believes and has good grounds for believing that the party has other documents material to the question in the action: see Brett, M. R. in *Comp. Financière v. Peruvian Guano Co.* 11 Q. B. D. p. 61.

The object of this practice is to prevent a conflict of affidavits as to whether the affidavit of documents is sufficient: Cotton, L. J. in *Jones v. Montevideo Gas Co.* p. 559.

A judge will be severe if he finds that expenses have been incurred through a wrongful suppression of material documents: Thesiger, L. J. *ibid.*

Because the other side cannot adduce evidence to contradict the affidavit of documents, it ought to be full, and will be construed strictly: Cotton, L. J. in *Gardner v. Irvin*, 4 Ex. D. p. 53; and the statutory form must be strictly followed: see *post*, pp. 222, 230 (and so expressly laid down by the Court of Appeal in a recent case, unreported).

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(a) *Interrogating as to Documents after Affidavit of Documents.*

The only remedy which the party has where the adversary's affidavit of documents is sufficient (see *ante*, pp. 210, 211) is to interrogate.

If any document is suspected to be wrongly omitted from the affidavit (for instance, where by reason of the general form in which the affidavit is necessarily framed, see *post*, p. 221, the party believes that there are documents to which the party's recollection has not been called, or that he has taken rather too wide a view in his own favour as to what may or may not be pertinent, see *Newall v. Telegraph, &c. Co.* pp. 762—764 : and see *post*, p. 223), but the affidavit is technically sufficient, the only course for the party to pursue (after, perhaps, calling the adversary's attention to any particular document said to be omitted, as suggested by Wickens, V.-C. in *Newall v. Telegraph, &c. Co.*) is to administer interrogatories : *Jones v. Montevideo Gas Co.* 5 Q. B. D. p. 558 : *Newall v. Telegraph, &c. Co.* L. R. 2 Eq. 756 : *Thorpe v. Sutcliffe*, 39 L. J. Ch. 712 : *Catt v. Tourle*, 18 W. R. 966, and 19 W. R. 56 : and so, if possible, force the necessary admissions as to possession and relevancy. For this purpose it was formerly necessary for a plaintiff (a defendant filed a concise statement for the purpose : see *Newall v. Telegraph, &c. Co.*) to amend his bill : *Catt v. Tourle* : *Thorpe v. Sutcliffe* : *Noel v. Noel*, 1 D. G. J. & S. p. 492. Under the present practice, if one set of interrogatories has been already delivered, or in actions in which under rule 1 leave is necessary, application must be made for leave to interrogate for this purpose.

The circumstances under which it is admissible to interrogate for this purpose, and the kind of interrogatory which would be allowed, were considered by the Court of Appeal in a recent case of *Hall v. Truman*, 29 Ch. D. 307 : 52 L. T. 586.

In that case, after the defendants had made an affidavit of documents admittedly sufficient, the plaintiff interrogated them whether they had not

in their possession correspondence between themselves and certain persons, ledgers, valuations, &c. The Court of Appeal, affirming Kay, J. held the interrogatory inadmissible. "Though the interrogatory refers to particular classes of documents, it is expressed in perfectly general terms. It amounts to a cross-examination of the defendant on his former affidavit as to documents, and that is a thing which cannot be allowed. . . . It is difficult no doubt to say what circumstances would justify the putting of an interrogatory as to documents to a party who has already made a sufficient affidavit of documents. But if the court is satisfied that notwithstanding the affidavit there is or may be some specified relevant document or documents in the possession of the party, whom it is desired to interrogate, it may possibly be right to allow an interrogatory to be put whether that particular document or those particular documents is or are in his possession. But a *prima facie* case must be shown before such an interrogatory can be permitted: and it should be made the subject of a special application. . . . In any case it must be a matter for the discretion of the judge. . . . And in my opinion, it would never be right to allow a general roving searching interrogatory, such as this is, to be put:" Cotton, L. J. p. 320.

It may be suggested that whereas in order to justify the court in ordering a further affidavit of documents only the admissions of the party can be looked at, it would be legitimate to file an affidavit to show the existence of other documents in support of an application to interrogate.

A party may, it is conceived, in a proper case, interrogate, although he might have successfully applied for a further affidavit; but Field, J. seems to have held otherwise in *Robinson v. Budgett*, W. N. 84, p. 94.

It is admissible, also, to interrogate in the case of a claim to protect a document from production in order to show that the facts are not such as to support the claim: see *Catt v. Tourle*, 18 W. R. 966, and 19 W. R. 56: *Scanston v. Lishman*, *post*, p. 226: and the dictum cited *ante*, p. 110, of Bowen, L. J. in *Lyell v. Kennedy*, 27 Ch. D. p. 30. But see *post*, p. 491, as to interrogating to documents constituting the adversary's evidences.

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(b) *The Circumstances under which a further Affidavit of Documents will be ordered.*

The court is not restricted to requiring from a party one affidavit of documents only: it may require him to make

another at any time, if there is a reasonable probability or presumption or even ground for suspicion, derived from certain sources, that he has other relevant documents in his possession : see Cotton, L. J. in *Lyell v. Kennedy*, 27 Ch. D. p. 20, and in *Hall v. Truman*, 29 Ch. D. p. 319 : and *Noel v. Noel* and *Wright v. Pitt*, *post*, p. 217 : or (according to Brett, M. R. in *Comp. Financière v. Peruvian Guano Co.* 11 Q. B. D. p. 63, but see *ante*, p. 181, discussing this dictum) if it can be shown from these sources that there are documents which it is not unreasonable to suppose may contain information which may directly or indirectly enable the applicant to advance his own or damage his adversary's case.

The sources into which the court may look for this purpose are the following :—

The affidavit of documents : *Jones v. Montevideo Gas Co.* 5 Q. B. D. p. 558 : *Comp. Financière v. Peruvian Guano Co.* 11 Q. B. D. p. 61 : *Hall v. Truman*, 29 Ch. D. p. 319.

The documents referred to in such affidavit : *ibid.* : or (it is conceived) referred to in his answer, or his pleadings : *qu.* whether any other documents : see *Lyell v. Kennedy*, 27 Ch. D. p. 20 : *A. G. v. Emerson*, cited *post*, p. 503 : *Wagstaffe v. Anderson*, *post*, p. 218 : and see as to documents neither admitted nor denied, but verified by affidavit, *Addis v. Campbell*, *ante*, p. 211.

The pleadings : *ibid.* : *Lyell v. Kennedy*, p. 20 : and in particular admissions in the party's own pleadings : *Jones v. Montevideo Gas Co.* p. 558 : *Saull v. Browne*, *post*, p. 217.

Answers to interrogatories : see the chancery cases, *post*, p. 217.

*Qu.* whether any other affidavit of the party. In *Wright v. Pitt*, *post*, p. 217, Lord Hatherley seemed to consider it admissible to look at any other statement of the party on oath. In *Cocq v. Hunsagaria Coffee Co.* W. N. 1868, p. 216, a further affidavit was

ordered, the party having omitted certain documents mentioned in his answer and in depositions before an examiner which were referred to in his answer. In *Alcock v. Gill*, W. N. 1869, p. 270, the omission of documents mentioned by the secretary of the defendant company in his examination *ex parte* was not considered a ground for ordering a further affidavit. Where after an affidavit of documents had been made by a relator and plaintiff certain documents apparently relevant were referred to in an affidavit of his agent as being in his possession, a further affidavit was refused: *A. G. v. Castleford*, 27 L. T. 644.

See also generally as to the sources into which the court will look for the purpose of testing the truth of a claim to withhold a document, *post*, p. 503 ; or an answer to an interrogatory, *ante*, p. 109.

The justification for the ordering of a further affidavit is that the party has by his own admissions discredited the statement in his affidavit of documents : see *Wright v. Pitt*, *post*, p. 217.

The denial of relevancy when repeated in the further affidavit is conclusive, unless the court is reasonably satisfied of its untruth : see *ante*, p. 181.

The court is bound by the description of the nature of the documents in these sources, though not by every description of their contents, if it can see from their nature that the description is not or may not reasonably be correct: *Brett, M. R. Comp. Financière v. Peruvian Guano Co.* 11 Q. B. D. p. 63 : and see as to the acceptance by the court of the party's description of his documents where he claims protection for them, *post*, pp. 231, 503.

Where the adversary charges that the party has omitted from his affidavit improperly certain documents, the reason of the omission may be either that they are not relevant or that he never had them in his possession. The adversary must therefore show from the above sources that they are (or



may be, see *ante*) relevant and that the party had or has them in his possession. Where therefore it was not so shown that the plaintiffs had a certain document in their possession (that is "possession" for the purpose of the affidavit, see *post*, p. 224: the language here used by Baggallay and Brett, LL.J. seem too narrow, for if they had at any time had the document, see *Noel v. Noel*, *Ross v. Dublin, &c. Co.* *post*, it should have been included in the affidavit, see *post*, p. 222), a further affidavit was refused as to that document though ordered (see as to the usual order *post*, p. 218) as to the others, which with it had been referred to in a document disclosed in the affidavit: *Compagnie, &c. v. Peruvian, &c. Co.* pp. 60, 65, further cited *ante*, p. 184.

The following are the chancery cases on the subject. See also those in the note *ante*, p. 215: *post*, p. 234, as to sealed up portions of documents: and *Welsh, &c. Co. v. Gaskill*, *post*, p. 217.

No admission in express terms is necessary if by inference from statements in the pleadings the judge is satisfied that the party has other material documents relating to the questions in the cause in his possession: see Jessel, M. R. in *Saull v. Browne*, L. R. 17 Eq. 402; and *Storey v. Lennox*, 1 M. & C. p. 535. In *Saull v. Browne*, the defendant in his answer had set out a long list of customers of his business which could not have been made from memory but in his affidavit of documents mentioned no books of the business.

"Reasonable suspicion" (the phrase used in *Noel v. Noel*, 1 D. G. J. & S. 468, and see *Lyell v. Kennedy*, *ante*, p. 211) is no ground unless it is founded on the pleadings and affidavits: see Selwyn, L. J., in *Wright v. Pitt*, L. R. 3 Ch. p. 811: as in *Noel v. Noel*, where documents (letters) referred to in the answer, clearly relevant and which must have been at one time in the defendant's possession were omitted from the affidavit; and see *Westminster, &c. Co. v. Clayton*, 12 W. R. 123, where a further affidavit was ordered on the ground of omission of documents admitted by his answer to be in his possession and apparently relevant.

To make *Noel v. Noel* applicable the party must have made some admission throwing discredit on the sufficiency of his affidavit: Lord Hatherley in *Wright v. Pitt*, p. 811: or some statement on oath: *ibid.* p. 810 (see as to this *ante*, p. 215).

Because a party owning land the subject of the action includes no deeds relating thereto a further affidavit cannot be ordered, for his ancestor may have mortgaged the land so that he may never have had any deeds in his possession: *ibid.* p. 810.

Where a railway contractor included no accounts or vouchers in his affidavit, Hall, V. C. refused to order a further affidavit not being judicially convinced that there were or ever had been such documents, or having sufficient assurance of it: *Appleby v. Waring*, L. J. Notes, 1880, p. 125.

Merely because it is suspected that a party has stated facts incorrectly or untruly the court is not at liberty to disregard those statements.... His answer may be open to every possible suspicion and yet according to the practice the court cannot reject it: *Bowes v. Fernie*, 3 M. & C. p. 637 (but

this was in connection with sealing up parts of documents referred to in an answer, see *post*, p. 235, and not a question of ordering a further affidavit of documents, see *ante*, pp. 109, 211).

Query whether where trust funds the subject of the action have passed through a party's private account, and no pass book is scheduled, there is sufficient ground for the court's action. This point arose in *Richards v. Watkins*, 6 Jur. N. S. 168, but it does not appear clearly whether the decision was based on this ground.

In *Wagstaffe v. Anderson*, 39 L. T. 332, the defendant made no statement as to documents which had been in his possession, and therefore a further affidavit was inevitable: but the court seemed to think that it might be sufficient ground for ordering a further affidavit that the plaintiff had obtained possession of a letter (from the defendant's agents to himself) which should have been scheduled in the defendant's affidavit as having been in his possession and which referred to other letters which should also have been included: but qu. whether this could have been brought within the principles laid down above.

In *Original Hartlepool, &c. Colliery Co. v. Moon*, 30 L. T. 193, a further affidavit was ordered, certain letters by the client to the solicitor having been discovered and produced, but not the letters in answer to which they were written.

So where letters from a third person to the solicitor were scheduled in the affidavit and they were endorsed with words showing that they were answered, it was held that the affidavit was insufficient in not accounting for the copies of these answers: *Weal v. Garnes*, 28 S. J. 513: whether their production could be ordered was another question: *ibid.*

Where production was ordered of certain books which had been referred to by the plaintiff and he produced some books on an affidavit and subsequently a further affidavit saying that these were the only books he had ever had relating to the subject, the Court of Appeal on inspecting the books were satisfied that though the affidavit was sufficient in form the plaintiff was keeping back documents which he ought to discover and therefore dismissed his action: *Danvilliers v. Myers*, W. N. 83, p. 58, further cited *post*, p. 588.

Where a company omitted from their affidavit of documents a balance sheet and books of account which were clearly relevant to the matters in question, and where it appeared from documents included in the affidavit that the balance sheet and books were or had been in their possession a further affidavit was ordered: *Ross v. Dublin, &c. Co.* 8 L. R. Ir. 213, following the rule laid down in *Jones v. Montevideo Gas Co.* *ante*.

See also *Richard v. Watkins*, 6 Jur. N. S. 168: and *Imperial Land Co. of Marseilles v. Masterman*, 22 W. R. 66 (referred to by Malins, V.-C. in *Corp. Hastings v. Irall*, L. R. 8 Ch. pp. 1019—1020), where the Court of Appeal reversed the vice-chancellor's order which he made for a further affidavit on the ground of omission of documents referred to in a document disclosed in the affidavit of documents.

See also *Bowes v. Fernie* and *Purcell v. MacNamara*, *post*, p. 234, where the indexes raised suspicion.

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(c) *As to the course taken by the Court in Cases where the Affidavit is Inconsistent or Discredited as ante, p. 214.*

Where it is shown to the satisfaction of the court that any documents may have been wrongly omitted from the affidavit the court will either order a further affidavit as to the particular documents: *Noel v. Noel*, 1 D. G. J. & S. 468: *Wil-*

*lett v. Thiselton*, 1 N. R. 42 : *Abud v. Riches*, 2 Ch. D. 360 : *Compagnie Financière v. Peruvian Guano Co.* 11 Q. B. D. 55 (see *ante*, p. 184) : *Vyse v. Foster*, L. R. 13 Eq. 602 : and see the form, App. Ch. I. : or a further general affidavit : see the form, App. Ch. I. : *Cocq v. Hunasgaria Coffee Co.* W. N. 68, p. 216 : *Westminster, &c. Co. v. Clayton*, 12 W. R. 123 ; *Abud v. Riches* : *Saull v. Browne*, L. R. 17 Eq. 402 (see *ante*, p. 217), where apparently (and see the form, App. Ch. I.) the order was for a further general affidavit stating in particular whether the defendants had in their possession any and what documents relating to a certain business ; or it may refuse to order a further affidavit at all as in a recent case (*ex rel.*) where the court was of opinion that the omission was neither directly nor indirectly of importance : and see *Hall v. Burke* (reported *Times*, Aug. 7th, 1884) where the court refused to order a further affidavit, considering that though the document in question (disclosed in an answer) might be more or less material its disclosure was not necessary before trial : and see *ante*, p. 215. Or the court may after a number of insufficient affidavits have been put in, merely declare the insufficiency of the affidavit, and so leave the party liable to be proceeded against under Ord. XXXI. r. 21 : see for instance *Thomas v. Palin*, 21 Ch. D. 360, cited *post*, p. 584, where application for attachment was made against him : and see *ante*, p. 146, as to such an order in the case of an insufficient answer.

In *Boices v. Fernie*, 3 M. & C. it was stated, pp. 637—638, that where with respect to a particular matter a party has made inconsistent and contradictory statements the adversary may adopt and act upon that which is most in his favour, and that if there were any books or accounts as to which there were any contradictory statements or as to which the documents themselves showed a discrepancy in the statements, an order would be made for their inspection. But the practice is to allow the party to file an affidavit in order to explain the discrepancy, as in *Westminster, &c. Co. v. Clayton* where a document not included in the affidavit was referred to in the answer as apparently relevant and

also as being in his possession. See also *ante*, p. 210 : and *post*, p. 235, as to sealed up parts of documents.

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(d) *As to the Manner in which the Affidavit must be made.*

The affidavit of documents being in reality an answer to an imaginary interrogatory (see *Rochdale Canal Co. v. King*, 15 Beav. 11, and *ante*, p. 155), and there being no distinction of principle between the obligation to state facts in it and in an answer to interrogatories (see *ante*, p. 140), must be made in the same manner and under the same conditions as interrogatories must be answered, that is to say, according to the best of the party's knowledge information (remembrance) and belief : see as to this obligation in answering interrogatories *ante*, p. 127 : and see para. 7 of the form of affidavit, *post*, App. Ch. I. : and see also *post*, p. 502, as to properly examining documents when protection is claimed for them.

There must be a proper examination of the documents in order that they may be correctly scheduled : *Gabbett v. Cavendish*, 3 Sw. 267, n.

The number of the documents is no excuse for an imperfect examination of them, and the court will if necessary allow time to prepare a proper schedule : *Combe v. Corp. London*, 15 L. J. Ch. pp. 82—83 : and see *Williams v. Prince of Wales, &c. Co.* 23 Beav. 338 : and *Vyse v. Foster*, L. R. 13 Eq. 602 : and see App. Ch. I. as to form of summons for time : and *ante*, p. 144, as to extension of time for answering interrogatories.

In *Price v. Price*, 48 L. J. Ch. 215, the party said in his affidavit that he was unable to say exhaustively that there might not be other documents which he was unable to find : the affidavit was held insufficient.

See *Ellicand v. McDonnell*, *post*, p. 223, where after a diligent search certain documents could not be found.

Where documents which ought to be included in the affidavit are not in the party's corporeal possession he is bound to make the same exertions and take the same steps in all

respects as if he were interrogated either directly as to the contents of such documents or as to matters which he could only answer by reference to and inspection of them : (as to which see *ante*, p. 135, and in particular *Taylor v. Rundell* cited on p. 136) : see *ante*, p. 195, as to producing documents not in his corporeal possession.

The parties must give all the information in their power in this respect : *Clinch v. Financial Corporation*, L. R. 2 Eq. p. 273.

Where partnership documents were numerous and in different parts of the world and the time and expense of preparing a schedule would be great the party was held bound to schedule them in the affidavit : *Vyse v. Foster* : and see *Whyte v. Ahrens*, 32 W. R. 312, where six months was given for filing an affidavit of documents in Japan.

The party must satisfy the court that he has taken all proper means to get the information : *Mertens v. Haigh*, 3 D. G. J. & S. 528. In this case the defendant in answer to an interrogatory for discovery of documents said that all his documents were in the possession of his clerk at New Orleans, that it would be necessary for him personally to go there to search select and procure them and that he could not do so without running the risk of being arrested : it was held (diss. Knight Bruce, L. J.) that it was not sufficient on the ground that it did not appear that he made inquiries of any persons who would be likely to give him information.

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(e) *As to the Form of Affidavit—as to lost Documents.*

The affidavit, to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the form No. 8 in App. B (see App. Ch. I.), with such variations as circumstances may require. Rule 13.

This form is the same as that in use under the Ch. P. Act, 1852 : *Rochdale Canal Co. v. King*, 15 Beav. 11.

It is framed on the model of a carefully prepared answer to the interrogatories of a searching bill : *ibid.*

The form of affidavit is obligatory : “shall be” not “may be” as in the old rule 13, see App. Ch. II. But even under that rule it was intended to be the common form and to be exhaustive : Lindley, L. J. W. N. 76, pp. 39—40 : the form in use under the C. L. P. Act, 1854, section 50 being held insufficient : *Anon.* W. N. 75, p. 240. In chancery though not obligatory it was generally adhered to and only varied in so far as might be necessary to meet the circumstances of the case, Dan. Ch. F. 1934 : *Rochdale Canal Co. v. King* : *Woodhatch v. Freeland*, 11 W. R. 398.

Any omission renders the affidavit insufficient (see *ante*, p. 210) unless a satisfactory reason is given for the omission, as in *Woodhatch v. Freeland*, 11 W. R. 398, where a satisfactory reason was given for the omission of the words “in the possession or power of our solicitors or agents” : and see *Ledwidge v. Mayne*, 11 E. R. 463.

For instance where nothing is said as to documents which have been in the party’s possession or power : *Wagstaffe v. Anderson*, 39 L. T. 332 : *Anon.* W. N. 76, p. 38.\*

A bankrupt must therefore include in his affidavit all documents which he has had in his possession and has handed over to his trustees : *Anon.* W. N. 76, p. 38, but see *ante*, p. 55. A party must schedule all documents (for instance letters which he has not preserved) which have been in his possession and are lost or destroyed : see *Rishton v. Grissel*, 14 W. R. 789, where it was so held in answer to interrogatories.

Where a document which a party once had in his possession has been lost he must state how it was lost and where, if he can : *Taylor v. Oliver*, 34 L. T. 902 : and see the form of affidavit *post*, App. Ch. I.

But where documents admitted by a former answer to have

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\* At common law an interrogatory under the C. L. P. Act, s. 51 could be administered for discovery of documents which had been in the party’s possession : *Lethbridge v. Cronk*, 23 W. R. 703.

been in his solicitor's possession had been mislaid and after a diligent search could not be found, so that he was unable to set them forth in a schedule, it was held sufficient: *Ellwand v. McDonnell*, 8 Beav. 14.

See as to documents no longer in his possession or power of which he is unable to give a list: *Ellwand v. McDonnell*, cited *ante*, p. 220.

The form is only in very general language: and although an order for a special affidavit as to particular documents or generally as to documents in respect of a particular matter may be made: see forms in Seton, pp. 136, 137: *Quinn v. Ratcliffe*, 9 W. R. 65: and see *ante*, p. 158, as to limiting the affidavit: it may sometimes be necessary to interrogate in order to get discovery of this more searching nature, when for instance, the affidavit being so technically sufficient as to preclude the court from ordering a further affidavit, the adversary believes that there must be documents in the party's possession to which his recollection has not been called or that he has taken rather too wide a view in his own favour as to what may or may not be pertinent to the case, and interrogates for specific information of papers relating to particular matters: see *Newall v. Telegraph, &c. Co.* L. R. 2 Eq. pp. 762, 764: Dan. Ch. Pr. p. 1762: *ante*, p. 212: and *Swanston v. Lishman*, cited *post*, p. 226. It is a legitimate office of interrogatories to call the party's attention to specific matters which may have been disregarded or overlooked in a general allegation, see *ante*, p. 133.

The common form was held sufficient by the Court of Appeal even where an affidavit had been filed in support of the application for the order (on a liquidator) charging possession of particular documents, a direct denial of the particular documents not being necessary: *Welsh Steam, &c. Co. v. Gaskill*, L. J. Notes, 1877, p. 38: 36 L. T. 352.

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(f) *As to the Documents which must be included in the Affidavit of Documents as in the Party's Possession or Power.*

The purpose of the affidavit of documents is not merely to enable production to be ordered from the party himself. Its object is also to discover the existence of documents which have been in his possession or power and what has become of them and in whose possession they are (see the form, App. Ch. I.) and also of documents in which he has a joint property with other persons not before the court (and their names, see *ante*, p. 198) and which therefore he cannot be ordered to produce, in order that the adversary may be enabled (1) to get production or even possession of them from the persons who have possession of or a property in them: see *ante*, pp. 21—23: (2) to extort their contents by means of interrogatories: see *ante*, p. 198: and see *Swanston v. Lishman*, cited *post*, p. 226: and *Freeman v. Fairlie*, cited *ante*, p. 138: see also *Martineau v. Cox*, cited *post*, p. 226: and *Eglinton v. Lamb* and other cases cited *post*, p. 227: where this purpose is lost sight of.

“Possession or power” is used as well in reference to the affidavit of documents as in reference to actual production: but the words must of necessity be given a wider interpretation in the former connection than in the latter: see *ante*, p. 193.

By paragraph 7 of the form of affidavit (see App. Ch. I.) the expression “possession or power” is interpreted to cover all documents in his own possession custody or power, or in the possession custody or power of his solicitors or agents solicitor or agent or in the possession custody or power of any other persons or person in his behalf.

(1) *As to the Documents in the Party's own corporeal Possession.*

All documents must be included which are in his corporeal possession whether he has the exclusive property or only a partial property in them.

It is conceived that he must also schedule those in his corporeal possession (“his custody” but see *post*, p. 226, as to

the solicitor's custody) in which he has no property at all. In *Reid v. Langlois*, 1 M. & G. p. 636, Lord Cottenham defines possession for the purpose of production as legal possession the right and power to deal with the documents, not merely corporeal possession as being in his desk or in his house. But though this is so undoubtedly as regards production, see *ante*, p. 194, it does not follow that it is so for the purpose of discovery, that is to say inclusion in the affidavit. "If you have any possession that is enough": see *Clinch v. Financial Corporation*, L. R. 2 Eq. p. 273. In this case the defendants, directors of a bank, who were also defendants and had made an affidavit of documents by their secretary, were held bound to schedule documents the property of the bank as being in their possession or power, for they were the only persons who could give an order for their production: but it is clear that no order for production could have been made against them without including the bank in the order, or at the least serving the order on the bank, see *ante*, p. 209.

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(2) *As to Documents not in the Party's own Corporeal Possession.*

All documents must be included which are in his own possession or power or in the possession custody or power of his solicitors or agents solicitor or agent or in the possession custody or power of any persons or person on his behalf: see para. 7 of the form *ante*.

All documents must be included in which the party has any property at all, that is to say whether they are held on his sole behalf or on his behalf jointly with other persons: see for instance *Bovill v. Cowan*, cited *ante*, p. 198: *Mertens v. Haigh*, cited *ante*, p. 221: *Swanston v. Lishman*, cited *post*: and the cases cited *ante*, p. 21, where a list of documents was ordered though not their production.

A partner must schedule partnership documents if they are relevant or contain relevant entries though the other partners are not parties: *Lazarus v. Morley*, 5 Jur. N. S. 1119: *Vyse v. Foster*, L. R. 13 Eq. 602. In *Mar-*

*tineau v. Cox*, 2 Y. & C. 638, the defendant, a partner resident in England, was held not bound to schedule documents belonging to his firm which carried on business in Portugal partly on the ground that he was not bound to write to his partner or to know the affairs of the partnership in Portugal, and partly on the ground that if he made a schedule no production could be ordered if the other partners refused to give them up, and therefore the court would not order a schedule which was merely a means to that end. As to the first ground, see *ante*, pp. 137, 138: as to the second ground, this is to confound the questions of discovery and production: and see *ante*, p. 224, as to the purposes of the affidavit. The following observations of Jessel, M. R. in *Sicanston v. Lishman*, 45 L. T. 360, bear upon this point. It was an action against the managing owner of a ship for an account; the defendant in his affidavit of documents stated that all the accounts were kept by a firm of H. & Co. In answer to interrogatories he admitted that he was a member of the firm and that they managed the ship, but refused to answer as to or set out a list of the books of account of the firm containing entries relating to the ship, or as to his having a right of access to them, or as to their being under his control. "The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession whether you are bound to produce them or not. And I have even known a Chancery judge threaten to order a defendant to set out verbatim all relevant portions of documents where he attempted to protect himself against production by alleging joint possession of himself and partners." See also *ante*, pp. 135, 136.

As to documents in the possession custody or power of his solicitors or agents in which he has no property: qu. whether the language of the affidavit is not theoretically wide enough to include them, the words "on his behalf" not necessarily applying to "solicitors or agents."

It is not the practice to schedule the solicitors' books of business as containing entries relating to the matters in question: though in *Flight v. Robinson*, 8 Beav. 22, the solicitors' books letter books journals ledgers, &c. were scheduled, their production (see p. 40) not being ordered apparently as being the solicitor's property (see p. 30). See also *ante*, p. 208, as to the property in letters written to or by a solicitor and copies of them.

In *Bond v. Northover*, 1 Y. & C. 221, it was held insufficient, in answer to an interrogatory for a party to deny that he had possession or power of the documents in question and to say nothing as to that of his solicitor, for if the solicitor got them aliunde or (but qu.) had a lien upon them they were not in the party's possession or power though in the solicitor's hands.

In *Airey v. Hall*, cited *ante*, p. 199, an agent's account books were scheduled: and see *Reid v. Langlois*, also there referred to.

A decision of Kindersley, V. C. in *Eglinton v. Lamb*, 14 W. R. 170, would seem to establish clearly that it is not necessary to schedule documents which are the solicitor's own property: but the reasons given for the decision are not satisfactory. In that case the solicitors of the defendants (trustees) had entered into their own books the rents received by them of the trust property: and the Vice Chancellor held that these books need not be included in the defendants' affidavit as they were not their own property, and therefore the defendants could not be ordered to produce them. In an earlier case before the same judge the defendant had employed his son who was a solicitor to receive the income of trust property: he was held not bound in answer to an interrogatory to set forth a list of the son's documents containing entries referring to the trust estate, the V. C. observing that the principle that the plaintiff has a right to enforce discovery of books and documents in the

possession of the defendant's agent and being his private property was erroneous: *Colyer v. Colyer*, 4 L. T. 226: and see also *Woodhatch v. Freeland*, 11 W. R. p. 399, before the same judge. It is submitted that the Vice Chancellor loses sight of an important purpose of the affidavit of documents, see *ante*, p. 224. Production of these documents undoubtedly could not be ordered against the party: see *ante*, p. 199: the point is whether discovery of the entries could not have been obtained, and whether such documents ought not to be scheduled in order to inform the opponent of their existence. In this very case of *Eglinton v. Lamb* the Vice Chancellor admitted that the trustees would be entitled to have copies of these entries from their solicitors, though of course, as he observed, they were not bound to get copies in order to schedule the copies, they having no copies at the time in their possession. And qu. whether a solicitor can refuse production of his ordinary books to the client: see *Woodhatch v. Freeland*, 11 W. R. p. 399. It may be noted that counsel have been ordered to produce drafts retained by them as precedents for the benefit of any person interested in them: *Stanhope v. Roberts*, 2 Atk. 213.

As to the necessity of scheduling documents in the hands of former agents, see *McIntosh v. G. W. R. Co.* cited *ante*, p. 142, in connection with the subject of the information of agents necessary to be given in answer to interrogatories.

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(g) *As to what is sufficient Description of the Documents.*

As to what is sufficient description for the purpose of protection, see *post*, sub-sect. (h).

Production cannot be ordered unless the documents are so described or identified as that the court can determine whether the order has been complied with, that is, whether the documents referred to have been produced: *Atkins v. Wright*, 14 Ves. p. 213: *Taylor v. Batten*, 4 Q. B. D. p. 87: *Christian v. Taylor*, 11 Sim. p. 408: *Nicholl v. Jones*, 2 H. & M. p. 595: *Ledwidge v. Mayne*, 11 E. R. 463. The object (not the sole object, see *ante*, p. 224) of the affidavit is to enable the court to make an order for production of the documents mentioned in it if the court thinks fit to do so, and a description of the documents which enables production if ordered to be enforced is sufficient: Cotton, L. J. in *Taylor v. Batten*, 4 Q. B. D. p. 89. See *Kettlewell v. Barstow*, *post*, p. 522, where a further affidavit was ordered on the ground of insufficient description: and so also in *Corp. of Bristol v. Cox*, 26 Ch. D. p. 685.

The other party has no right to such a description of the documents as may enable him to test the truth of the affidavit thereby: see Cotton, L. J. *Taylor v. Batten*, p. 88: nor to discover their contents or what they are: see *post*, p. 231.

He may be entitled (see *ante*, p. 213) to get a more detailed description by interrogatories, but not necessarily or in every case, see *post*, p. 491, of documents which have been sufficiently described to justify the court in protecting them from production.

If words are used which if true protect the documents no further particularity is necessary than in the case for which protection is not claimed: Cotton, L. J. in *Taylor v. Batten*, p. 88. Qu. therefore as to *Taylor v. Oliver*, 24 L. T. 902, where Bacon, V. C. considered that where documents (deeds and other documents of title) were protected it was sufficient to set out the dates, but that if the opponent were entitled to production he would also be entitled to further identification, that is to say to have the dates parties and natures set out. In *Taylor v. Batten*, p. 89, commenting on *Fortescue v. Fortescue* (see *post*, p. 490), it was said that no detailed schedule was necessary showing the nature of title deeds: see further as to what description is necessary of protected documents, *post*, sub-sect. (h): and of the party's evidence, *post*, p. 488.

The early practice in chancery was to set out each document in the schedule. But the later practice was to tie them up in bundles or boxes: and this is the proper practice now (they ought to be set out in bundles and scheduled and numbered in such a way that the other party may ask for those which he wants to see, specifying them by their numbers; or otherwise earmarking them: see Cotton, L. J. in *Hill v. Hart-Davis*, 26 Ch. D. 470, p. 472: *Walker v. Poole*: and *Price v. Price*, 48 L. J. Ch. p. 216: and *Corp. of Bristol v. Cox*, 26 Ch. D. p. 681: but see *Owen v. Wynne* and *Bewicke v. Graham*, where qu. whether they were numbered): *Kain v. Farrer*, 37 L. T. 471: *Taylor v. Batten*, p. 88: *Christian v. Taylor*, 11 Sim. p. 408: *Walker v. Poole*, 21 Ch. D. p. 836, where an affidavit setting out each of a

number of letters (over 2,000) was ordered to be taken off the file as being an attempt to make costs: and see *Taylor v. Keily*, W. N. 76, p. 138.\*

"Certain documents letters and correspondence which have passed between my legal advisers and myself, &c." was held clearly insufficient: but an addition of the words "numbered 50 to 76 inclusive, tied up in a bundle marked A. and initialed by me" was held enough: *Taylor v. Batten*: "I have a bundle of papers marked G." is not sufficient identification: *Phelps v. Olive*, 4 Beav. 549, n. referred to in *Taylor v. Batten*, p. 88: nor "a bundle of letters": *Nicholl v. Jones*, 2 H. & M. p. 595: nor "divers books of accounts": *Inman v. Whitley*, 4 Beav. 549: nor "a bundle of deeds relating to my title": *Taylor v. Batten*, p. 88, approving *Fortescue v. Fortescue*, 34 L. T. 847, cited *post*, p. 490: but "three hogsheads sealed up containing old papers consisting of invoices orders for goods letters &c." was held sufficient: *Christian v. Taylor*, 11 Sim. 401: and see *Owen v. Wynne*, 9 Ch. D. p. 30, where there does not appear to have been any enumeration or identification of each document, the documents being manor records, court rolls, MSS. &c. but qu. as to the identification of the bundles being sufficient in this case, one only being marked: see also *Bewicke v. Graham*, cited *post*, p. 488, where the documents were numbered.

Where the affidavit is insufficient in this respect a further affidavit will be ordered (on summons to consider its sufficiency, see *ante*, p. 210): see for instance *Kettlewell v. Barstow*, *post*, p. 522.

Where the documents produced do not correspond with the description a further discovery on oath will be ordered in order to obtain production of the identical documents: *Tipping v. Clarke*, 2 Ha. p. 389. But the court cannot guard against fraud by substitution of other documents if they are similarly marked or numbered: *ibid.*

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\* But where the opposite party had already had a copy and had paid 19*l.* for it, it was held by the Court of Appeal to be more convenient to order the party who had made the affidavit to repay him 17*l.* the excess over the costs of the copy of an affidavit of proper length: *Hill v. Hart-Davis*, 26 Ch. D. 470, although it was held that the court had jurisdiction to order prolix or oppressive documents to be taken off the file, for it is the court's duty to see that its files are not made the instruments of oppression. (Here 4,216 letters were set out separately by their dates and names of writers and recipients.)

(h) *As to the Obligation of the Party to describe his Documents or otherwise set out Facts sufficiently to satisfy the Court that his Claim to withhold them from Production is well founded, and as to the Credit to be attached to his Statements.*

Any objections against production must be clearly and distinctly stated in the affidavit of documents: Dan. Ch. Pr. 1679. Protection must be claimed in terms definite and precise: *Smith v. Beaufort*, 1 Ha. p. 525.

The statements in the affidavit or in any affidavit of discovery must be accepted as true unless inconsistent or discredited, as pointed out *ante*, sub-sects. (a), and (b), and *post*, pp. 503—504. But in considering the question whether a relevant document should be protected from production, the onus is not on the opponent (as on a question of relevancy when the opponent must show by the party's admission direct or indirect that the document is relevant, see *ante*, pp. 153, 180), but the onus is on the party himself to show that it should be so protected: and he must state sufficient facts to satisfy the court on this point; and the court is not bound to accept a statement which is an inference from other facts not disclosed but which ought to be disclosed: see this point further discussed *post*, pp. 480, 489.

An affidavit ought not to say that the documents are privileged which is a statement of law, but ought to set out the facts to be verified on oath in accordance with Ord. XXXI. r. 13, and the form in the Appx. to the Jud. Act (see *post*, App. Ch. I.), from which the court can see that the party's view of the law is right: *Gardner v. Irvin*, 4 Ex. D. pp. 52, 53. For instance it is not enough to say that the documents in a schedule are privileged and the description in the schedule of some of the documents is only "correspondence with solicitors ledgers cash books &c." *ibid.* p. 53: (see further as to this case *post*, p. 372): and see *Kain v. Farrer*, 37 L. T. 470.

Although some description may be necessary the party need not give such a description as to enable any person to



know what they are: Lindley, L. J., in *Kain v. Farrer*. And where privilege is claimed for letters and correspondence he need not state the dates or the names of the writers of the letters, nor such other particulars of the correspondence as might enable the other party to discover indirectly the contents of the letters and thus furnish evidence against himself: Cotton, L. J. in *Gardner v. Irvin*, p. 53: and see *ante* (g) as to what description is necessary for the purpose of identification.

A statement to the effect that professional communications are confidential cannot be questioned by the other party: *Underwood v. Secretary of State for India*, 35 L. J. Ch. p. 540: 12 Jur. N. S. 321, where it was attempted to show that cases and opinions sworn to have been taken for the party's guidance in contemplation of litigation had been circulated amongst a certain class of persons and were therefore not confidential: see as to this case in connection with professional privilege *post*, p. 378.

The party's description of a document is accepted as accurate in point of appellation: see *post*, p. 490: but as to his statement of its effect see *post*, pp. 479, 482, 489; see also *ante*, p. 216.

See as to what description is necessary in respect of the party's evidence *post*, p. 488.

See as to what description is necessary in the case of documents for which protection is claimed as not relating to some particular matter in question *ante*, p. 186.

By consenting to produce some of the documents for which the party has claimed privilege he does not waive the privilege as to the others: *Lyell v. Kennedy* (cited *post*, p. 392): though it may be otherwise where part of a conversation is given and protection claimed for the remainder: *ibid*.

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(i) *As to the Practice where a Party has insufficiently claimed Protection.*

On a motion for production of documents disclosed in the affidavit of documents and for which the party has insuffi-

ciently claimed protection he is as a rule (see an exceptional case, *Boyd v. Petrie*, 17 W. R. 903, cited *post*, p. 494, where on account of delay leave to file a further affidavit was refused) allowed to file further affidavits for the purpose of showing that they ought to be protected: see *Taylor v. Batten*, 4 Q. B. D. p. 88: *Corp. of Hastings v. Ivall*, L. R. 8 Ch. p. 1021: *Talbot v. Marshfield*, L. R. 1 Eq. pp. 7—8: and see *Lyell v. Kennedy*, 8 App. Cas. p. 229, where, one of the documents by its description not bearing out the claim for privilege, a further affidavit was allowed in order to remove the difficulty: *Bulman v. Young*, 31 W. R. 766: and *Roberts v. Oppenheim*, 26 Ch. D. p. 733. See also *McCorquodale v. Bell* (*post*, p. 414), where the valid ground for protection was put forward in an affidavit filed on the motion for production.

In *Corp. of Hastings v. Ivall* the plaintiffs had claimed protection in a further affidavit for documents as evidencing their own title and not supporting the defendant's title. Some of these documents had been included in a former affidavit and had been ordered to be produced, and on such production were found to contain matter which might assist the defendant: *Malins*, V. C. on this ground ordered production of the other documents: the Court of Appeal considering there was a blunder ordered a further affidavit in lieu of production.

In chancery, before the practice of ordering an affidavit of documents was introduced by the Chancery Procedure Act, on motion for production of documents admitted in the answer the defendant would always be allowed to use affidavits for the purpose of protecting documents for which protection was not claimed or insufficiently claimed in the answer: *Llewellyn v. Baddeley*, 1 Ha. p. 530: *Smith v. Massie*, 4 Beav. 417: *Parsons v. Robertson*, 2 Keen, 605: *Blenkinsop v. Blenkinsop*, 10 Beav. 143: *Talbot v. Marshfield*, L. R. 1 Eq. pp. 7—8: (and so now *Bulman v. Young*, 31 W. R. 766): but at the party's own costs: *ibid.*: *Smith v. Massie*: nor would any affidavit in answer be admitted: see *Blenkinsop v. Blenkinsop* (see however this case, *post*, p. 425): and leave would also if necessary be given to file further affidavits for the purpose: *Llewellyn v. Baddeley*, p. 531: *Penruddock v. Hammond*, 11 Beav. 59: *Smith v. Beaufort*, 1 Ha. p. 525: *Goodall v. Little*, 1 Sim. N. S. p. 164: *Hughes v. Biddulph*, 1 Phil. 471.

In fact although technically the proper way of raising the question may be for the adversary to take out a summons for production of the documents in question: *Dan. Ch. Pr.* p. 1679: *Nicholl v. Jones*, 2 H. & M. p. 594: yet he may if he chose take out a summons for a further affidavit: *Gardner v. Irvin*, 4 Ex. D. p. 53; as was the chancery practice: *Nicholl v. Jones*.

If an affidavit claiming protection for documents some privileged and others not privileged does not sufficiently show which are entitled to protection the court will either

order production of all, or, as under ordinary circumstances would be the proper course, allow the party an opportunity of making a further affidavit to identify the documents entitled to protection: Cotton, L. J. in *Taylor v. Batten*, p. 88: and see Lindley, J. *Kain v. Farrer*, 37 L. T. p. 471.

Where at the desire of the parties and with a view of avoiding the delay and expense which might be occasioned by allowing the matter to stand over for production of a further affidavit the judge has taken upon himself the trouble and responsibility of looking into the documents and deciding whether they ought to be produced, it is not competent for either party afterwards to question the decision of the judge in a court of appeal: *Bustros v. White*, 1 Q. B. D. p. 427: and see section 49 of the Judicature Act, 1873. A master is not a judge within the meaning of this section and therefore a master's order is appealable: *Foster v. Edwards*, 48 L. J. Q. B. 767.

In the Admiralty and Divorce Courts the judge seems frequently to have inspected the documents himself: see *Macgregor v. Laird*, L. R. 1 A. & E. 307: *Winscom v. Winscom*, *Pollard v. Pollard*, 3 S. & T. 383, 613.

In chancery there have been cases where the judge has inspected sealed up portions of documents in order to determine whether the adversary should see them: see *post*, p. 235.

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(k) *As to sealing up or concealing Parts of Documents.*

(1) *The Principle.*

Where one part of a document is relevant and another part irrelevant (or only consequentially relevant or irrelevant to a particular matter in question) or where protection can be claimed for one part and not for another part, the part which is irrelevant or consequentially relevant or can be protected may as a rule be sealed up and so concealed from inspection on the party's oath as to its nature, under the same conditions as if the part so concealed constituted a separate document. See an exception *Pickering v. Do. post*, p. 236, where the

adversary had an interest of the nature of property in the document.

The mere fact however that any part of a generally relevant document is irrelevant does not necessarily entitle the party to conceal that part. In every document there may be much which is not strictly relevant but the party is not therefore entitled to cover up such part unless there is some reason why he should not be compelled to produce it for inspection: nor is the court under any obligation to read through documents to ascertain the relevancy of any part of them: *Luscombe v. Steer*, 37 L. J. Ch. pp. 120, 121: but see *Caton v. Lewis and Lafone v. Falkland Islands Co. post.* In *Luscombe v. Steer* the document in question was an agreement two clauses of which the defendant set out but objected to produce the rest for inspection as being irrelevant. Stuart, V. C. was of opinion that the document was clearly relevant and that the two clauses set out depended on and were not intelligible without other parts of the document, and therefore the whole document must be produced.

Subject to these considerations the party's oath in respect of the concealed portions has the same validity as in respect of documents omitted from the affidavit or withheld from production (see as to statements of irrelevancy *ante*, pp. 180, 212). In *Sheffield, &c. Canal Co. v. Sheffield, &c. R. Co.* 1 Phil. 484, on a motion for production (for the purpose of an appeal) of a book unsealed, part of which had been sealed up, supported by an affidavit showing that a resolution had been passed which ought to have been entered in it and must have been in the part sealed up, no affidavit in answer being filed, Lord Cottenham was unable to see how consistently with the practice he could make the order. In *Purcell v. Macnamara*, referred to in Wigr. pl. 319, a book having been produced with certain pages sealed up as irrelevant, in the index at the end was contained a reference to a page in the sealed up parts which showed if the index were correct that the page referred to was relevant. Lord Eldon refused to allow the seals to be broken, on the ground that the answer concluded the question. This decision however seems very close to the border

line. In *Bowes v. Fernie*, 3 M. & C. 632, a party having liberty to seal up parts of books not relating to the matters in question had sealed up the whole of the indexes including the references to the parts left open, but subsequently uncovered them and also other parts originally sealed up, and sealed up (as he explained by mistake) parts originally open: Shadwell, V. C. ordered that the master should open and inspect all the books and report what parts ought not to be inspected and fasten up such parts only: Lord Cottenham, pp. 637—638, held that such an order could not be sustained and that the utmost which he could do would be to order inspection of particular books or accounts as to which there were any contradictory statements in his affidavits or as to which the documents themselves showed a discrepancy in the statements. See also *ante*, p. 219, citing this case.

In some cases the judge has ordered the parts to be unfastened in order that he might inspect them himself: see *Lafone v. Falkland Islands Co.* 27 L. J. Ch. 25, where the statements claiming privilege for the sealed up portions were unsatisfactory: *Caton v. Lewis*, 1 W. R. 118, where the judge considered on inspection that passages in letters sealed up as irrelevant might possibly have reference to the questions at issue and allowed inspection by the adversary.

The following cases are instances of sealing up:—

Parts of deeds not relating to the parcels: see the cases cited *post*, p. 508; or to the adversary's interest: *Chichester v. Donegal*, L. R. 5 Ch. p. 499 n.: parts of pedigrees evidencing or relating exclusively to the party's own title or altogether irrelevant: *Kettlewell v. Barstow*, L. R. 7 Ch. 686 (cited *post*, p. 522): not parts of court rolls as against a freehold tenant: *Warrick v. Queen's Coll.* L. R. 3 Eq. 683: parts of books letters and other documents in trade mark actions: *Carver v. Pinto Leite*, L. R. 7 Ch. 90, and other cases cited *post*, p. 553: parts of ledgers or business books: *Gerard v. Penswick*, 1 Sw. 533: and *Clarke v. Bull*, 15 C. B. N. S. 851: money items therein: *Mansell v. Feeney*, 2 J. & H. 320: parts of letters: *Campbell v. French*, 1 Anst. 58: parts of books containing entries of privileged matter: *Wilson v. Northampton & Co. R. Co.* L. R. 14 Eq. 477: parts of an indorsement on a brief and of shorthand notes as being privileged: and see *Ayres v. Levy*, 19 L. T. 8, *post*, p. 237: part of a map as irrelevant: *Fazakerley v. Gillibrand*, 8 L. J. Ch. 237: inspection of documents limited to entries relating to specified matters on affidavit that they are the only entries so relating: *Firkins v. Lowe*, 13 Pri. pp. 206—207.

In some cases irrelevant and relevant matters or matters

capable of protection and matters not so capable may be so mixed up as to be practically incapable of separation.

Where an executor who is bound to keep separate and distinct accounts of the estate mixes up these accounts with his private or partnership accounts: *Freeman v. Fairlie*, 3 Mer. pp. 43—44 : or a steward mixes up his employer's money with his own in his banker's books: *Salisbury v. Cecil*, 1 Cox, 279 : or a partner enters partnership accounts in his own private books or diaries and mixes them up with his own private affairs: *Carew v. White*, 5 Beav. 172: he must suffer the inconvenience of having done so and will only be allowed to conceal such parts if any as he can separate from the rest as being absolutely irrelevant. See also *Pickering v. Pickering*, *post*.

Where privileged and unprivileged matter is mixed up in a document the court will lean towards protecting the whole: see *Churton v. Freuden*, 2 Dr. & Sm. pp. 393—394 : and *Lodge v. Pritchard*, 4 D. G. & Sm. 587 (deposition of witness) and see *post*, p. 394.

Where the party seeking discovery has an interest of the nature of property (see *post*, Ch. VII.), in certain documents, it is not necessarily sufficient in order to entitle the other party to seal up certain portions of the documents for him merely to swear that they do not relate to the matters in question, as in the ordinary case ; but he may be ordered to state to what matters the portions for which he claims protection do relate in order that the court may be able to see for itself that they are not relevant. Where residuary legatees had obtained an administration decree against the executors and also an order for partnership accounts between the testator and J. T. one of the executors, the court refused to order a further affidavit of the partnership documents with liberty to seal up in the ordinary form but limited the liberty of sealing up to portions relating to three matters particularly mentioned which were not partnership matters, for the fact that the letters and entries which he desired to seal up were in the partnership books raised a *primâ facie* presumption that they related to partnership matters, and it should not be left to him to decide whether or not they so related, for instance letters to his solicitors, bankers, private friends, &c. : and the partnership books were not solely his books, the plaintiffs having an interest in them, and being in fact his *cestui que trusts*: *Pickering v. Pickering*, 25 Ch. D. 347. (Note in this case that the report states he was cross-examined on his affidavit of documents : see *ante*, p. 211.)

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(2) *The Practice.*

If a party desires to conceal any parts of his documents from inspection he must apply to the court for leave to seal them up.

The whole of a document the subject of an order for production (see *ante*, p. 192) must be produced in its integrity: the party has no right to mutilate or remove any part of it: the responsibility of sealing up rests with the court: *Ayres v. Levy*, 19 L. T. 8, where a party had torn out letters which he said were privileged: and the party is technically liable to attachment for breach of the order for production in such a case, though the court would as a rule allow him to file an affidavit to protect the parts so withheld from inspection: see *Jones v. Powell*, 1 Sw. p. 535 n.

The order for production, whether the common order for the affidavit (in chancery, see *ante*, p. 154) or a special order, will on the party's application be qualified so as to allow him to seal up either specified parts of his documents or such parts as he may by affidavit state to be irrelevant or privileged: see Dan. Ch. Pr. 1681: Dan. Ch. F. (1879 edit.) 1732, 1733: Seton, pp. 134, 136: Smith, Ch. Pr. 939—940: and the cases *ante*, p. 235: and see *Pickering v. Pickering*, *ante*, p. 236. Or the right to seal up may be claimed in the affidavit of documents though the order have not been qualified: see Smith, Ch. Pr. 940: Blox. 46. In case of omission to get the order qualified leave to seal up will always be granted on an application for that purpose at any time. According to the chancery practice where the omission had been in applying to have the order for the affidavit of documents so qualified, the costs of such an application were costs in the cause, for the party could not at the time of making the order know the particulars of his documents sufficiently to say whether such a qualification was necessary: but otherwise where the order was for production of documents admitted in the answer, for he must of necessity know, when the order was applied for, what his documents were and whether the qualification was necessary: *Talbot v. Marshfield*, L. R. 1 Eq. pp. 7—8.



No affidavit was necessary on the application : *Curd v. Curd*, 1 Ha. 274 : on app. 6 Jur. 307.

Where liberty to seal up has been obtained in the ordinary form (see *ante*) the terms of the order must be complied with : where therefore the party concealed from inspection parts of documents which he had omitted to seal up, this was a breach of the order for production : *Colman v. West Hartlepool, &c. Co.* 5 L. T. 266.

Leave has been given to seal up open and reseal business books in use as occasion might require : *Mertens v. Haigh*, Johns. p. 739.

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XI. *As to the Obligation of the Inspecting Party not to divulge the Contents of the Documents to other Persons.*

A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit : *Williams v. Prince of Wales, &c. Co.* 23 Beav. 336, p. 338 : nor to use them or copies of them for any collateral object : *Richardson v. Hastings*, 7 Beav. 354 : *Hopkinson v. Burghley*, L. R. 2 Ch. 447 : and so shareholders inspecting the company's books under an order have no right to divulge the information so acquired : see *Re Joint Stock Discount Co.* 15 W. R. 99. If necessary an undertaking to that effect will be made a condition of granting an order : see the form in Seton, p. 139. In *Richardson v. Hastings*, where it was said that the plaintiff's object was to assist him in other actions against the defendants, the undertaking seems to have been so limited : in *Hopkinson v. Burghley* (the documents being private and confidential letters, see *ante*, p. 206), it is not clear whether it was limited or general. In *Williams v. Prince of Wales, &c. Co.* the plaintiff was a shareholder, and it was said that he would use the company's documents in order to publish prejudicial statements concerning the company : the undertaking seems to have been in the above general form. In *Tagg v. South Devon Railway Co.* 12

Beav. 151, Lord Langdale refused to insist upon any such undertaking, conceiving that there was no necessity for it although an action at law was pending on the same matter. Injunctions for this purpose have been granted: *Williams v. Prince of Wales*, 23 Beav. p. 338.

The principle however is not that the party cannot be compelled to divulge them for any other purpose even if the court should in any case so think fit, but that they cannot be used except under the authority of the court: *Reynolds v. Godlee*, 4 K. & J. 88, pp. 91—92. It would be very inconvenient if such an authority in the court did not exist, so as for instance to enable evidence obtained in this way to be used in any subsequent suit: see *ibid.* In this case the plaintiff had obtained production from H. one of the defendants of a document (an opinion of counsel taken by a person through whom both plaintiff and defendant claimed) to which he had referred in his bill as part of his case against H. The other defendant G. moved for production of a copy which the plaintiff had made of that document. Lord Hatherley directed the motion to stand over for G. to be served. The document was ultimately protected on the ground that the plaintiff himself was entitled to claim professional privilege for it: see *post*, p. 387. Qu. whether the court should apply this principle so as to allow a defendant to inspect copies made by the plaintiff of documents in a co-defendant's possession of which he (the plaintiff) has obtained inspection, as suggested by Lord Hatherley in this case, for a defendant would so indirectly obtain production from a co-defendant. See further as to this case in connection with the subject of documents obtained in confidence and for a limited purpose *ante*, p. 206, and see generally as to the distinction between a voluntary disclosure out of court and disclosure by way of discovery under the compulsion or sanction of the court *post*, p. 302, and *ante*, p. 206.

## CHAPTER VI.

DOCUMENTS REFERRED TO IN THE PLEADINGS OR AFFIDAVITS  
(OTHER THAN THE AFFIDAVIT OF DOCUMENTS, see *post*,  
p. 242.)

THE practice as to documents referred to in the pleadings or affidavits (qu. as to the affidavit of documents, see *post*, p. 243) is now to some extent regulated by Rules 15, 16, 17, and the first part of Rule 18. But it does not seem possible to dispense with a consideration of the old practice in equity and at common law in this respect: see therefore, *post*, Sections II. and III.

### I. *The present Practice.*

Rules 15 to 18 are as follows:—

Rule 15 (old rule 14). Every party to a cause or matter shall be entitled, at any time (a), by notice in writing, to give notice to any other party (see *ante*, p. 58), in whose pleadings (b) or affidavits (b) reference (c) is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor (see *ante*, p. 177), and to permit him or them to take copies (see *ante*, p. 174) thereof; and (see *post*, p. 244) any party not complying with such notice shall not (d) afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant (f) to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in (d) which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

Rule 16. Notice (e) to any party to produce any documents referred to in his pleading or affidavits (b) shall be in

the Form No. 9 in the Appendix B (see *post*, p. 243) with (e) such variations as circumstances may require.

Rule 17. The party to whom such notice is given shall (e) within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit (b) as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit (b), then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at (see *ante*, p. 165) the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business at (see *ante*, p. 170) their usual place of custody, and stating which, if any, of the documents he objects to produce, and on what ground. Such notice shall ("may" in the old rule) be in the Form No. 10 in Appendix B. (see *post*, p. 243), with such variations as circumstances may require.

Rule 18.\* If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere (see *ante*, p. 170) than at the office of his solicitor, the judge may (see *post*, p. 244, n.), on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: and (this part of the rule is considered *ante*, p. 154) except in the case of documents referred to in the pleadings or affidavits (b) of the party against whom the application is made or disclosed in his affidavit of documents (b), such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

(a) The words in the old rule were "at any time before or at the hearing thereof." See as to applications at an early stage *Quilter v. Heatley*, *post*, p. 244.

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\* In place of this rule were two old rules 17 and 18. Rule 17: "If the party served with notice under rule 15 omits to give notice of a time for inspection or objects to give inspection, the party desiring it may apply to a judge for an order for inspection." Rule 18: "Every application for an order for inspection of documents shall be to a judge (see *post*, p. 606), and except in the case, etc. . . ."

(b) As to documents referred to in the pleadings, see *post*, p. 244.

See the definition of "pleadings" in section 100 of the Jud. Act, *post*, p. 572.

Particulars are pleadings for the purpose of this rule: *Cass v. Fitzgerald*, W. N. 84, p. 18.

Qu. whether the indorsement on a writ is not a pleading: see Ord. XX. r. 1: though under the old rules it was not a pleading so as to be made the subject of admission: *Wallis v. Jackson*, W. N. 84, p. 40.

As to whether "affidavits" includes the affidavit of documents or any affidavit of discovery. In the common law division "affidavits" has been interpreted to include the affidavit of documents, the machinery of this and the following rules being used to obtain inspection of documents disclosed in the affidavit of documents, the order for the affidavit not directing production as in the Chancery Division, see *ante*, p. 154. Had it not been for this practice it might have been doubtful whether it was the intention to include it. In the first place in rule 18 the phrase "documents referred to in the pleadings or affidavits . . . or disclosed in his affidavit of documents" is used, thus distinguishing between the two cases. In the second place, if "affidavits" is to include the affidavit of documents, by the latter part of rule 15 the plaintiff is *prima facie* at least put under an obligation to produce all his documentary evidence, that is to say, in default of doing so he becomes subject to the penalty of being unable to use them in evidence: see *Roberts v. Oppenheim*, 26 Ch. D. 724, per C. A. affirming Kay, J.: see *post*, pp. 243—245: *Smith v. Harris*, 48 L. T. p. 870: and *Mayor and Corp. of Bristol v. Cox*, 26 Ch. D. p. 685 (opinion set out in claim): and *post*, p. 244. The judgments of the C. A. in *Quilter v. Heatley*, 23 Ch. D. 42, pp. 49—51 (and see this case further cited *post*, p. 244, and see also *Roberts v. Oppenheim*) certainly seem to treat these rules as not applying to documents which are only scheduled in the affidavit of documents. Nor is rule 17 necessarily inconsistent with this view: the case there contemplated might be the case where the document is set forth in the affidavit of documents as well as referred to in a pleading or affidavit. Qu. whether on principle such a penalty should attach to any documents referred to in an affidavit in answer to interrogatories, and whether it should not be confined to voluntary affidavits, and not extend to compulsory affidavits of discovery.

See as to documents referred in an affidavit (not of discovery) in a matter: *Re The Credit Co.*, 11 Ch. D. 256, *post*, p. 292.

(c) The documents need not be identified or particularly described: it is sufficient if they are referred to generally: *Smith v. Harris*, 48 L. T. 868: and see *Re The Credit Co.* 11 Ch. D. 256. Where the plaintiff in his claim alleged that he had used the word "Glenlivet" on his invoices letters and bill heads and branded the same on his casks, an order was made for production of all the invoices letters and bill heads referred to in the claim which had "Glenlivet" branded on them: *Smith v. Harris*. Production of the casks could not be ordered, for they were not documents, nor could an order be made that they should be rolled into court: *ibid.*; but see as to inspection of articles and particularly in actions for infringement of patents, *post*, Book III. Chap. VI.

Where entries in a book are referred to, the inspection will be limited to the particular entries: see *Quilter v. Heatley*, *post*, p. 245.

Where letters are referred to, production cannot be ordered of copies which he may very probably have in his possession but which he has not referred to: *ibid.* p. 49.

(d) The words "in which" to the end of the rule were not in the old rule 14.

Even under the rule as it then stood it was considered that the judge might legitimately in some cases admit the document in evidence. In *Webster v. Whewall*, 15 Ch. D. 120, the plaintiff having referred to a title deed in his claim, the defendant gave notice under rule 14 to inspect it: the

243. *After note (f).*

The mere reference to a document in a party's pleadings or affidavits does not it is obvious *ex necessitate rei* involve an admission of relevancy. Where therefore application is made for an order for inspection of a document the reference to which involves no such admission, it is conceived that the applicant on the one hand may file an affidavit alleging relevancy, and the adversary on the other hand may file an affidavit denying relevancy, and that such last-mentioned affidavit is conclusive unless the court is reasonably satisfied of its untruth, as *ante*, p. 181.

In *Central News v. Eastern Telegraph Co.*, 28 S. J. 390, defendants, being asked when certain telegrams were received, answered that they were received at times prior to the plaintiffs' message, and were therefore not material: inspection was refused, for the court did not see how they could be material, and they were not included in the affidavit of documents.

As regards the latter part of rule 18, which is considered *ante*, pp. 154, 155, it may be pointed out that "such application" must be read as "an application for inspection."

*Roberts v. Oppenheim*, *post*: the following points seem to be established thereby:—

(1) Whether "affidavits" in rule 15 includes the affidavit of documents or not (see *ante*, p. 242), there is a clear distinction between an application for production of documents disclosed in the affidavit of documents and an application for documents referred to in (voluntary affidavits or, see *ante*, p. 242) the pleadings.

(2) That there is a special obligation on a party to produce documents referred to in his pleadings (this is in accordance with the old common law practice, see *post*, p. 263; but in opposition to the old chancery practice, see *post*, p. 246).

(3) That a defendant is as a rule entitled to see documents referred to in the statement of claim before putting in his defence.

(4) That the rule does not take away any right which apart from this rule he would have to protect the document from inspection, and that in such a case he will not be compelled to produce it but he will become subject to the penalty of not being at liberty to put it in evidence: see *Roberts v. Oppenheim*, 26 Ch. D. 724: and 50 L. T. 117, 729, affirming (but under different circumstances, see *ante*, p. 243) Kay, J. and distinguishing *Quilter v. Heatley* on the ground that there was no claim to privilege, whereas here the plaintiff had properly claimed privilege for them as documents relating exclusively to his own title, etc. . . . see further, *post*, p. 494.\*

“There is a broad distinction between a general application for discovery of documents relating to the matters in question in the action and an application for production of documents referred to in the pleadings. . . . But as to documents referred to in the pleadings the case is different. The general rules as to discovery of documents are intended to give a party discovery of all documents relating to the case which are in his adversary's possession unless there is some sufficient ground for refusing production. Rules 14—17 are very differently expressed and are confined to documents mentioned in the pleadings or affidavits. These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings”: Lindley, J. *ibid.* pp. 49—50.

Bowen, L. J. after referring to discovery of documents under rule 12 says, p. 51: “The present case comes under a different set of rules. Ord. XXXI. r. 14 provides for immediate production of any document which a party has referred to in his pleadings or affidavits. The party against whom the application is made must produce them unless he can shew good cause why he should not. If he refuses, the party applying can go to the judge who may refuse the application if he sees good reason for so doing. . . . In my opinion the onus is on the refusing party, but if the onus were on the applicant I think he has discharged himself from it.”

Where they are mentioned in the statement of claim it is reason enough why the defendant should be allowed to see them that the plaintiff has made them a part of his statement of claim: it is not a sufficient answer to such an application to say that the defence has not been put in. The defendant may say, “Your case depends partly on a set of documents which you may have set out incorrectly (see as to this point *post* and *post*, pp. 253, 256), I wish to see them. It may be that I have made admissions which will put me out of court. I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence.”

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\* The latter part of rule 15 is not therefore imported into the first part of rule 18, so as that on an application thereunder the judge has only to consider whether the case falls within the exceptions of that part of rule 15, as suggested by Chitty, J. *ibid.* p. 45.



It seems to me the very object of the rules that the defendant should have power at once to see documents referred to in the statement of claim: see Jessel, M. R. *ibid.* p. 48: and see *Smith v. Harris*, 48 L. T. 868.

It was said by Chitty, J. p. 45 that he had heard the Master of the Rolls say that the main object of the rule was to prevent fictitious deeds or documents being invented by the pleader and inserted in the statement of claim, which like the old bill in chancery was not sworn to as was the answer: but see also as to the answer, *post*, pp. 253, 256. Lord Langdale in *Bate v. Bate*, 7 Beav. p. 539, alludes to this having been done for the purpose of intimidating the defendant from stating the truth of his own case: and see *ante*. In *Roberts v. Oppenheim*, Kay, J. points out that, neither claim or defence being now on oath, a defendant may equally set up a fictitious document, as a release; and that this furnishes no ground for making the distinction which is made by rule 15 between the obligation of a defendant and plaintiff in respect to documents relating only to his own title: but in the C. A. as reported 50 L. T. p. 730, Cotton, L. J. considered that, the defendant being the man attacked, there was a reason for giving him this privilege which did not exist as regards the plaintiff. But see *post*, p. 458, and the references there given.

The documents of which production was ordered were certain letters and entries in business books (production of the books with liberty to seal up such parts as did not contain the particular entries referred to) referred to by the plaintiff in his statement of claim in support of certain allegations, before the defence was put in, some dicta of Denman, J. to the contrary in *Webster v. Whevall* (referred to *post*) being disapproved and the decision of Chitty, J. who on the authority of those dicta had refused an order for production on the general ground (p. 47) that no such order should be made before the defendant had pledged himself to some line of defence (see as to this point in connection with discovery generally *ante*, pp. 14, 160: see also *post*, p. 251) unless under special circumstances, being reversed.

As to the necessity of an admission of possession for an application under the first part of rule 18.

No admission it seems is necessary, for the party is at liberty to answer that he has not got them and cannot get them (meaning it is conceived that he has them not in such sole legal possession as that an order could be made against him for their production, see *ante*, p. 194): see Jessel, M. R. in *Quilter v. Heatley*, 23 Ch. D. p. 49. Certainly an application for an order is justifiable if on receiving the notice for inspection the party does not say that he has them not: *Smith v. Harris*, 48 L. T. p. 870.

Lord Eldon in *Princess of Wales v. Liverpool*, 1 Sw. 114, where (see *post*, p. 248) the bill claimed in respect of certain promissory notes but contained no admission of possession, doubted, pp. 122, 123, whether the same admission was necessary in such a case as in the case of an order for production against a defendant, or whether in some cases the court would not assume his possession of the documents on which he made his demand. The order (see *post*, p. 248) which he actually made was not for production, but for extending the time for answering until production, the plaintiff being at liberty to file an affidavit in reply: ultimately, 3 Sw. 567, an order was made for dismissal of the suit in the event of non-production. In a subsequent case, *Jackson v. Sedgwick*, 2 Wils. 167, he seems to have considered that he could not make an order for production of documents mentioned in the bill without possession being shewn. Lord Langdale, in *Taylor v. Hemming*, 4 Beav. p. 238, considered that an admission of possession on the record was necessary to found an order similar to the first order made in *Princess of Wales v. Liverpool*.

A mere reference to a document in the answer was held not to involve an admission of possession: see *post*, p. 256.

## II. *The old Chancery Practice as to Documents stated or referred to in the Pleadings.*

Generally, it may be said that the common law practice (see *post*, p. 263) of producing instruments relied on in the pleadings, whether under the doctrine of *profert* or otherwise, did not obtain in equity: see Wigr. Pl. 400, 417, 418; Harr. pp. 218, 228; and *post*, pp. 251, 254.

Qu. whether even a charge that a document relied on by a party was forged or not genuine necessarily entitled the opponent to have inspection of it: see the exceptional cases of *Princess of Wales v. Liverpool*, cited *post*, p. 248; *Jones v. Lewis*, *post*, p. 249; *Pilkington v. Himsworth*, *post*, p. 249: see an old case of *Hatton v. Marr*, Barn. 279, where it was said that whenever there was a suspicion of a deed by the defendant being forged he would be ordered to deposit it in court for inspection by the other side: see as to ordering documents whose genuineness was impeached to be inspected by witnesses, *ante*, p. 179: see *post*, p. 268, as to the common law practice where a document was impeached for forgery. See as to the liability to a criminal prosecution for forgery constituting a protection against discovery, *post*, p. 312.

(a) As to the right of the defendant to see documents stated or referred to in the bill.

(b) As to the right of the plaintiff to see documents stated or referred to in the answer.

(c) As to the right of the plaintiff to see documents which he sought to have set aside or reformed or which he otherwise impeached.

### (a) *As to the Right of the Defendant to see Documents stated or referred to in the Bill.*

A defendant had no special right to see such documents merely on the ground of such statement or reference whether before or after answer: even where it was said to be necessary for his defence (see the exceptional cases, *post*, disapproved): see Wigr. Pl. 400, 418, and *ante*: the general right of the defendant to see such documents stood on the same level

as his right to see documents not so stated or referred to: the same means of protection were open to the plaintiff in the one case as in the other.

Attempts were made to procure inspection of such documents before answer; but though in some cases it was allowed, the judges refused to make any general exception to the rule disentitling a defendant to discovery before answer in favour of such documents. The following are the cases on the subject.\* It must be remembered that in chancery the answer comprised as well the answer to interrogatories as the defence. See generally as to inspection before defence, *ante*, p. 160. How far a party was entitled to inspection for the purpose of giving discovery in answer to interrogatories is considered *ante*, p. 130. No answer (including production) to a cross bill for discovery, or production under the Ch. P. Act, could be obtained before sufficient answer to the original bill: see *ante*, pp. 133, 161: and see *post*, p. 602, as to priority of discovery.

In an old case of *Spragg v. Corner*, 1 Cox, 109, a motion was made for production of a deed stated in the bill and referred to as being in the plaintiff's custody and as ready to be produced as the court should direct: the motion was refused, the universal practice being by way of cross bill: and see Anon. 2 Dick. 778.

In *Pickering v. Rigby*, 18 Ves. 484, a suit by the executor of a deceased partner against the survivor for an account, the defendant moving before answer for inspection of the partnership accounts (whether they were referred to or not in the bill does not appear), Lord Eldon refused the motion but stated that he remembered that kind of motion by the defendant stating by his answer that the bill called for a discovery which he could not make completely without seeing the partnership books and accounts and that he verily believed those books and accounts to be the joint possession of which both were entitled were in the plaintiff's hands, that the court would (see as to this practice, *ante*, p. 134) stay proceedings against him for not putting in his answer until he had been assisted with that inspection.

In *Micklethwaite v. Moore*, 3 Mer. 292, a suit to set aside a partition of certain property on grounds of inequality in value and concealment and fraud on the defendant's part, the plaintiff alleged in his bill that the property had been recently valued and that from such valuation, a summary of which was set forth in a schedule, it appeared that the value of one lot was worth so much and of the other lot only so much; on an application by the defendant for inspection and for leave to amend his answer after such inspection, stating that as only the gross amounts were stated in the bill he was unable to state in what particulars the valuation was incorrect, Lord Eldon, referring to *Pickering v. Rigby*, observed that this application went much

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\* These cases are set out rather more fully than is perhaps necessary with respect to the point now under consideration; but this has been done for the purpose of reference on other points.

further and that he could not have compelled production even on a cross bill.

*Princess of Wales v. Liverpool*, 1 Sw. 114: 3 Sw. 567: was a suit against executors for payment of a sum secured by two promissory notes of the testator, the interrogatories asking as to their dates delivery signatures and effect. On an application by the defendants for inspection of one of these notes supported by an affidavit (Lord Eldon refusing to make any order without such an affidavit) alleging grounds for impeaching the authenticity of the note and stating the necessity of inspection in order that the answer might fully meet the case, Lord Eldon extended the time for answering until after inspection, and ultimately ordered the bill to be dismissed if production were not made by a certain day. In the argument, p. 116, some stress is laid on the point that the defendants were interrogated as to the signature of the note. Lord Eldon, p. 123, stated that the general rule of the court was that production could only be obtained by a cross bill, an answer to which, p. 124, could not be had until after answer to the original bill, but that there might be a case in which it was necessary production should be had before answer, and that in such a case the rule would work injustice unless it admitted relaxation and exception, for that there was, p. 125, no general rule with respect to the practice of a court of equity that would not yield to the demands of justice. In support of such an exception reference was made to a passage in the Practical Register, p. 161: "Where a deed in the plaintiff's hands mentioned in the plaintiff's bill was necessary to the defendant's making in his defence a full answer the court ordered the plaintiff should give him a copy of it." And so when the case again came before him, 3 Sw. 567, Lord Eldon, p. 569, after stating that it was not usual on motion to require a plaintiff by the production of documents to aid a defendant in the preparation of his answer, observed that he had satisfied himself on principle and the authority of text writers that where a defendant pledged himself by his oath, assigning reasons fairly affecting the judgment of the court, that he could not answer the bill as it was his duty to answer it as well for himself as for those in whose behalf he was entrusted with the distribution of the property unless the plaintiff produced instruments stated in the bill, he could compel that production necessary for the preparation of a full answer; and that he had the less difficulty in that case because the instrument was one of the securities on which the demand was made, and the court would not make a decree for payment of that demand until all the securities were delivered up, and would not allow a duplicate to remain in the hands of any but the defendants.

In the course of his judgment Lord Eldon referred, 1 Sw. p. 119, to the doctrine of proferret and the common law practice (see *post*, p. 264, as to proferret and this practice, and see *ante*, p. 246, as to impeached documents) of compelling on motion the production of bills of exchange or promissory notes the subject of an action, or, p. 123, of a written instrument, as a promissory note, in order that the defendant might see by whom it was written whether on a stamp and with the other requisites. So far as this practice was adopted by way of analogy to the equity practice of production Lord Eldon expressed his disapproval, on the ground that there was a mighty difference between simply producing an instrument and producing it in answer to a bill of discovery where the defendant had an opportunity of accompanying the production with a statement of everything which was necessary to protect him from its consequences: and so Lord Langdale in *Bate v. Bate*, 7 Beav. p. 537: and so in Wigr. Pl. 330, see *post*, p. 254: (and see *Brown v. Thornton*, 1 M. & C. 243, and *post*, p. 601, as to the practice of not severing the production of a document from the answer to a bill of discovery of which it was a part in an action at law).\*

In *Jackson v. Sedgwick*, 2 Wils. 167, Lord Eldon referring to *Princess of*

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\* But this objection ceased to have any validity after the passing of the C. L. P. Acts and the Chancery Procedure Act.

*Wales v. Liverpool* said, "It appeared to me on the authority of that work (Practical Register) that, if a defendant swears that he cannot safely put in his answer without a production of papers which the plaintiff has stated in his bill, the court would give him time to answer till there should be a production of the papers." In this case he refused to make an order for inspection upon an application founded on the mere circumstance of the documents being mentioned in the bill, without even any statement in the bill as to their being in the plaintiff's possession.

In *Jones v. Lewis*, 2 S. & S. 242, a suit against devisees for specific performance of an agreement entered into by the testator, on an application by the defendants for inspection of the agreement on an allegation that they did not believe that the testator had entered into any such agreement, and that they believed it to be a forgery (see *ante*, p. 246) and that they were unable to answer the bill without inspection, Leach, V. C. extended the time for answering until after inspection, considering that the doctrine that a plaintiff must produce an instrument stated in his bill before answer where it was plainly necessary to enable the defendant to make a full defence was recognized in *Princess of Wales v. Liverpool*, and was obviously required by principles of justice. This decision was however reversed by Lord Eldon himself.

*Princess of Wales v. Liverpool* was followed in *A. G. v. Brooksbank*, cited *ante*, p. 71.

In a case in the Exchequer (*Pilkington v. Himmworth*, 1 Y. & C. 617, and see *post*, p. 254), production was ordered by the Lord Chief Baron of a promissory note, on which the defendant had sued the plaintiff at law and which the latter alleged (denied by the defendant) to have been paid and left confidentially in the defendant's hands, in imitation apparently of the common law practice of ordering production of an instrument impeached for forgery (see *ante*, p. 246): though it was said that in equity in such a case its production would not be ordered. This case was distinguished from *Freeman v. Baker* (there, p. 618, referred to), where production was refused of a bill of exchange impeached by the defendant as having been indorsed without consideration but ordered of the cheque alleged to have been given for it, on the ground that in that case the want of consideration would not appear on the bill whereas here the inspection of the note might help the plaintiff. See also *Threlfall v. Webster*, cited *post*, p. 268.

In *Penfold v. Nunn*, 5 Sim. 409, the plaintiff referred in his bill to certain bills of exchange, which he said had been delivered up to him, and to a bill account, a copy of which was annexed to the bill, and interrogated as to the consideration for and other particulars of the bills and as to the correctness of the bill account: the Vice Chancellor refused an application by the defendant for their production, observing, p. 410, that he never understood and could not accede to the reasoning of the decision in *Princess of Wales v. Liverpool*, and that where a defendant as in this case could not put in an answer without inspecting certain documents, he was at liberty to call upon the plaintiff to produce them, and if the plaintiff refused he (the plaintiff) could not complain that the answer was insufficient (as to which see *ante*, p. 134), but that where inspection was required for his defence he must file (but no answer to the cross bill could be compelled before sufficient answer to the original bill) a cross bill for discovery.

In *Milligan v. Mitchell*, 6 Sim. 186, Shadwell, V. C. considered that he was not bound to follow *Princess of Wales v. Liverpool* except in a case precisely similar to it, and refused to apply that decision to certain entries in a minute book referred to in the bill. See also *Damer v. Portarlinton*, 15 Sim. p. 383, disapproving *Princess of Wales v. Liverpool*.

In two cases of *Shepherd v. Morris*, 1 Beav. 175, and *Taylor v. Hemming*, 4 Beav. 235, Lord Langdale extended the time for answering until after inspection of certain documents referred to by the plaintiff in his bill considering on the authorities that he could not make a direct order for production. In *Shepherd v. Morris* the document in question was a report made by order of the plaintiff upon certain accounts of the defendant and showing

errors therein: the plaintiff referred to this report in his bill and offered inspection of it in order that the defendant might explain these errors; the plaintiff subsequently refusing inspection, Lord Langdale, p. 179, observed that it was clear that the defendant could not know without inspection what the alleged misstatements were, and that the plaintiff could not be allowed to call for an answer stating the result of such inspection and say he should not have it. In *Taylor v. Hemming*, 4 Beav. 235, the plaintiff referred to certain correspondence between two of the defendants and a third person in support of certain fraudulent allegations, offered to deposit the same if required, and to avoid the expense of setting it out set the letters forth in a schedule. The order, see p. 238, extended to all the letters so set forth as being the only ones referred to, but not to other letters, part of the correspondence, not stated in the schedule nor part of the plaintiff's case; there being further (see as to this *ante*, p. 245) no statement on the record that the plaintiff had them in his possession. At p. 237 Lord Langdale says, "If the plaintiff refers in his bill to documents in his possession as forming part of his case, then, whether he does or does not offer to produce them, he cannot call on the defendants to answer until he has seen the documents which are necessary for his answer. The court has acted on that principle from the earliest period and the *Princess of Wales v. Liverpool* is not the first case: judges have said that they could not understand on what principle that case was founded but I believe it to be founded on principles which examination would fully support."

In a subsequent case, *Bate v. Bate*, 7 Beav. 528, Lord Langdale refused to make a similar order with respect to certain correspondence by which the plaintiff alleged in his bill (and interrogated thereto) that it would appear the defendant refused to produce a certain conveyance. On p. 537 he made the following observations. "The question is how far the plaintiff who refers to documents in his possession as evidence of the fact which he distinctly charges is bound to produce that evidence before the defendant is bound to put in his answer; that I take to be the question which is raised here. There have been several cases upon this subject; and I think they may be divided into two classes: first, cases like that of the *Princess of Wales v. Liverpool*; and secondly the two several cases which came before me and have been referred to, namely, *Taylor v. Hemming* and *Shepherd v. Morris*. Those were cases in which the plaintiff by his bill not only stated that he had possession of the documents, but, intending to use those documents in support of his case, he called upon the defendant to look at them and offered to produce them for the purpose. The plaintiff in substance and effect stated by his bill that the defendant could not give the answer which the plaintiff desired to have for his own use unless the defendant would look at those documents; and the plaintiff, having done that, then refused to produce the documents. I think I may assume after the investigation which this case has undergone that there is no case whatever to be produced in which the plaintiff charging a particular fact to be within the knowledge of the defendant and stating further that he has evidence of the fact in letters which are in his possession has been held bound to produce those documents before the defendant could be called on to put in his answer. The strong impression upon my mind is that there is no such case. None so contrary to the ordinary principle has been produced and I believe that if you were to lay it down as a proposition that a plaintiff shall not proceed until the defendant knows the evidence which the plaintiff has you would state a proposition very much at variance with the ordinary opinion of mankind as well as of lawyers." Lord Langdale then goes on to point out that the only proper form of getting such production is by a cross bill of discovery.

In *Turner v. Burkenshaw*, 4 Giff. 399, a suit by a party against his agent for account alleging the delivery of false and fraudulent accounts and requiring him to specify the particulars of these accounts, the defendant applied for extension of the time for putting in his answer till after production of these accounts, he having no copies of them nor the materials from which he had made them out. Stuart, V. C. refused the application on the ground that in



reality he wanted them in order to shape his defence from the information which he might obtain from them; he approved Lord Langdale's statement of the law in *Bate v. Bate* as given above, and considered that the language of the same judge in *Taylor v. Hemming* was not the law of the court.

In *Halliday v. Temple*, 8 D. G. M. & G. 96, the plaintiff referred to a passage in a particular letter in support of an allegation, and stated that, if advised, he should put in evidence all the correspondence between himself and the defendant: the defendant moved before answer for production of the correspondence. The plaintiff ultimately consenting to produce the letter, production of the rest of the correspondence was refused, Turner, L. J. observing, p. 99, that it was an application to see the evidence on which the plaintiff founded his case before the defendant put in his answer; that nothing would be productive of more mischief; that in cases of alleged fraud the defendant would be able to shape his defence according to the evidence; that the application was at variance with principle and the practice of the court; that only in one or two cases under special circumstances had such an application been granted, and that "the fact of a letter being stated in the bill does not enable the defendant to compel its production."

In *Smith v. Lay, Fairburn v. Lay*, 18 W. R. 915, on a motion under the Chancery Procedure Act being made to produce among other documents certain documents set out or referred to in the bill, the defendant alleging that he could not answer without seeing them, James, V. C. said that the court never made an order for production of documents by the plaintiff until the defendant had put in his answer, for that it would not do to let a defendant and his witnesses see what documents they had to meet.

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(b) *As to the right of the Plaintiff to see Documents stated or referred to in the Answer (see post, p. 256, as to impeached Documents).*

Here again (see *ante*, p. 246) there was no rule at common law entitling the plaintiff to see the documents relied on by the defendant for his defence. The only documents (impeached documents are discussed separately, *post*, p. 256) liable to production as being stated or referred to in the answer (that is to say that part of the answer constituting the defence and not the discovery, see *post*, p. 255) were those covered by the decision in *Hardman v. Ellames*.

In *Hardman v. Ellames*, 2 M. & K. 732, it was held by the Lords Commissioners, affirming a decision of Lord Cottenham when Master of the Rolls, that where a defendant stated a document in his answer wholly or partially and for the sake of greater caution referred to the document (that is to say used the common words of reference, "but this defendant for his greater certainty &c. . . . " see Wigr. Pl. 385), in order to show that the effect of the document had been accurately stated, its production would be ordered, though the defendant had sworn that it evidenced solely his own title.

This decision was the subject of considerable comment.

Lord Cottenham in *Adams v. Fisher*, 3 M. & C. 526, p. 548 (and see also his observations in *McIntosh v. G. W. R. Co.* 1 M. & G. 73, pp. 77—78, and



*post*, p. 255): thus refers to and explains *Hardman v. Ellames*:—"It was certainly no new decision, and I was very much surprised to hear any one treat it as such: and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it however unfounded which he pleases, but the plaintiff is entitled to see whether the defendant has rightly stated it; it is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it: not because the plaintiff has an interest in it; the principle is that a defendant shall not avail himself of that mode of concealing his defence." See *post*, p. 254, as to the rather different ground here taken.

Wigram, V. C. in his Book on Discovery, Pl. 385—424, criticises at great length and altogether disapproves both the decision itself and the explanation of it given by Lord Cottenham. That is to say he disputes the proposition that the common words of reference in an answer to a document partially or wholly stated therein confer upon the plaintiff a right to see it which without that reference he would not have: that a document such as a document constituting exclusively the defendant's own evidence an exclusively defensive document as the learned author frequently calls it, which on general principles (see Wigr. Pl. 388) is withheld from the inspection of the plaintiff, should become liable to production by the mere force of the words of reference. See further as to the learned author's views on *Hardman v. Ellames*, *post*, p. 253.

However the decision was always accepted as an authority, and Wigram, V. C. himself when sitting as V. C. in *Belsham v. Percival*, 15 L. J. Ch. 438; 10 Jur. 772, admits its binding authority; and accordingly where a defendant (administratrix) had set out part of a draft answer of the intestate to the original and craved leave to refer to the same when produced (or, according to the Jurist, referred to the remainder for greater certainty) ordered production of the part set out but not of the remaining part, *ibid.*

In *Howard v. Robinson*, 4 Dr. 522, an application for inspection of the mortgage by the plaintiff in a suit brought by a legatee against a mortgagee of a trust term charging notice of breach of trust and claiming priority, Kindersley, V. C. pp. 526, 527, puts these two cases; one where the plaintiff mentions the document and the defendant admits it; the other where the document is not referred to by the plaintiff and the defendant sets it up as destroying the plaintiff's right: he then goes on to say, "In that state of things if that were all, the plaintiff would have no right to the production of a deed which makes out the defendant's case by destroying the plaintiff's. Supposing the defendant after stating the deed and its effect says 'And so it will appear if the same shall be produced,' I am wholly at a loss to comprehend why these words should give any greater right to the plaintiff. . . . Now if the putting these words in the answer would give the plaintiff a right of inspection in either of these two cases it appears to me that it would be in the case where the deed is mentioned by the plaintiff and the defendant admits it and refers to it, and not in the case where the defendant sets up his own deed. But Lord Cottenham referring to *Hardman v. Ellames* in a subsequent case says that decision is misunderstood if it is supposed to decide that there is the right where the plaintiff mentions the deed. He says expressly all that it decides is that when the defendant sets up his own deed and refers to it he must produce it. I am bound to say I cannot follow the reasoning though if this were that very case I might be bound by the decision. But this is on the contrary that very case that Lord Cottenham says he did not mean to decide." See further as to this case *post*, p. 263, in connection with the subject of "impeached documents." The reference here was in the same form, "for greater certainty," see as to this point *post*, p. 254.

In some Irish cases *Hardman v. Ellames* was not narrowed in the same way. In *Phelan v. Hamilton*, 9 Ir. Eq. Rep. 264, and *Dundas v. Blake*,

9 Ir. Eq. Rep. 640: on app. 10 *ibid.* 260, production was ordered though they were mentioned in the bill, and, in answer to the argument that *Hardman v. Ellames* only applied to defensive documents, it was said, p. 262, that no such distinction was there taken and that the principle applied *à fortiori*. Qu. however whether in these cases the documents were not a part of that portion of the answer which consisted of the discovery as distinguished from the defence and therefore more resembling *Latimer v. Neate*, see *post*, p. 255.

The references in these cases and also in *Plumtree v. O'Dell*, Fl. & Kal. 589: and also in the English cases of *Welford v. Stainthorpe*, 2 Beav. 587: and *Hill v. Gomme*, 6 L. J. Ch. 258, were not in the particular form "for greater certainty."

In Ireland *Hardman v. Ellames* was applied to documents mentioned in a cause petition: *Fitzgerald v. Simpson*, 17 Ir. Ch. R. 141.

The subject both in relation to principle and authority is exhaustively treated in Wigr. Pl. 385—424. The following cases are referred to by the learned author in illustration: *Sparke v. Montriau*, 1 Y. & C. 103, p. 108: Wigr. Pl. 386, 414, where Lord Lyndhurst it seems took the same view as himself as to the purport of the reference: *Herbert v. Dean, &c. of Westminster*, 1 P. W. 773: Wigr. Pl. 407: *Atkins v. Wright*, 14 Ves. 211: Wigr. Pl. 386, 412: *Marsh v. Sibbald*, 2 V. & B. 375: Wigr. Pl. 386, 413: *Evans v. Richard*, 1 Sw. 7: Wigr. Pl. 386, 413: *Cox v. Allingham*, Jacob, 337: Wigr. Pl. 393: *Bettison v. Faringdon*, 3 P. W. 353: Wigr. Pl. 386, 408, 409: *Hylton v. Morgan*, 6 Ves. 296: *Shaftesbury v. Arrowsmith*, 4 Ves. 71: *Worsley v. Watson*, 6 Ves. p. 289: *Burton v. Neville*, 2 Cox, 242 (see also these last five cases discussed from another point of view *post*, p. 274): and *Princess of Wales v. Liverpool*, 1 Sw. 114, all referred to in Wigr. Pl. 409—411: *Bolton v. Corporation of Liverpool*, 1 M. & K. 88: Wigr. Pl. 414, 416: *Gardiner v. Mason*, 4 B. C. C. 479: and *Allcock v. Barrow*, Wigr. Pl. 415: *Tyler v. Drayton*, 2 S. & S. 309: Wigr. Pl. 360, 414: *Sampson v. Swettenham*, 5 Madd. 16: Wigr. Pl. 361, 414 (and see *post*, p. 481, as to these two cases): and see also a later case in the Exchequer *Farrer v. Hutchinson*, 3 Y. & C. 692, where the Lord Chief Baron Abinger, p. 701, refused to regard the mere reference (for greater certainty) to a document as in every case necessitating its production, though in the particular case, the defendant, having referred to a schedule of certain documents on which he relied and prayed that the schedule might be taken as part of his answer, they were in effect part of the answer (as to which see *post*, p. 255) and so must be produced.

In particular the learned author points out (see Pl. 373, 419) that the defendant's case is as stated on the record, and that the document to which reference is made is only the evidence of that case: that if the document when produced (if at the hearing he chooses to produce it) is at variance with or goes beyond his statement of its contents or effect, the defendant certainly cannot benefit and may even suffer thereby for he is limited to the case he has put on the record, and there is therefore no question of concealing his defence (see observations of Jessel, M. R. *ante*, p. 244: and see *post*, p. 256): that in fact the reference is merely for his own protection in case he should by mistake have pledged his oath to that which the court might afterwards determine in construction to be untrue: see Wigr. Pl. 386, 402, 414: that the rule that a plaintiff is entitled to judge of the effect of a document himself and not to take the defendant's word for it is confined to documents of which he is entitled to know the contents as a matter of discovery, and has no application to the case now being considered: see Wigr. Pl. 400: and finally that as to the suggestion in *Hardman v. Ellames*, p. 758, that if the plaintiff should think proper to amend his bill and require the deed to be set forth at length it would be a matter of course that it should be so set forth, this was taking for granted the very point in dispute, the question as to the right to production in such a case and the right to have it set out being identical (see also *ante*, p. 151) the one being a mere substitute for the other: Wigr. Pl. 395.

Mr. Hare discusses *Hardman v. Ellames* in Hare, pp. 212—228, and regards the decision as resting on the terms of the reference “for greater certainty,” considering that *Tyler v. Drayton*, *Sampson v. Swettenham*, *Shaftesbury v. Arrowsmith* and *Burton v. Neville* established that a reference without any such expression of uncertainty did not entail production. This view of the decision is not acceded to in Wigr. Pl. 388, and is dissented from even if correct: see also the cases cited *ante*, p. 253, where the references were different.

In any case the ground of the decision in *Hardman v. Ellames* is a very narrow one: it is based solely on the reference to the document: a full short or partial statement of its purport or contents without such reference, or a mere mention or description of it, even if the defendant said he relied upon it to prove his case, would not bring it within the decision: see Wigr. Pl. 336, 384, 394: and Hare, p. 216, 228: while on the other hand, the decision would seem to cover every document stated and referred to, whether it be one under which the defendant claims or justifies or one merely corroborative of such claim or justification: Wigr. Pl. 424. Lord Cottenham in his subsequent explanation of this decision in *Adams v. Fisher*, see *ante*, p. 251, though he expressly limited it to the case of documents not referred to by the plaintiff would seem to rest it on somewhat broader grounds. But even thus it is not brought up to the level of the broad common law practice under which, see *post*, p. 263, a party was entitled to inspection of any document relied on by his adversary in his pleading. In fact there was no such rule in equity: see Wigr. Pl. 390, 415, 420, and Hare, p. 229: and *ante*, p. 246. A reference to a deed in the answer was not equivalent to proferre: Wigr. Pl. 349. In Wigr. Pl. 330 (and see Pl. 400) the learned author refers with approval to Lord Eldon’s observations in *Princess of Wales v. Liverpool* (cited *ante*, p. 248) on the common law practice, and with disapproval to what he conceived to be the opinion of the Lord Chief Baron in *Pilkington v. Himsworth*, 1 Y. & C. p. 618 (referred to *ante*, p. 249), to the effect that where a document was so stated in the answer that in an analogous case a court of law would order production, therefore a court of equity should do the same. So again in Pl. 373, 402, he regards the principle protecting a document exclusively evidencing on the defendant’s oath his own title as extending as well to the instrument under which he claims or justifies as to documents merely corroborative of such claim or justification. So Mr. Hare, in Hare, pp. 216, 218, 228, considers the defendant’s oath equally effectual to protect either class of documents and whether stated or not stated in the defence. The mere fact that a defendant founded his title upon a particular document referred to (“as by the said indenture when produced will appear”) in his answer so far from entitling the adversary to see it was considered to be a reason for his not being allowed to see it. “The plaintiff is entitled to the production of a deed which sustains his own title, but he has no right to the production of a deed which is not connected with his title and which gives title to the defendant.” *Sampson v. Swettenham*, 5 Madd. 16, referred to Wigr. Pl. 361: and see *post*, pp. 481, 490, as to documents alleged to take away the adversary’s title. In *Tyler v. Drayton*, 2 S. & S. 309, see Wigr. Pl. 360, the defendant stated his purchase deed (the purchase being impeached by the plaintiff, see *post*, p. 257) and “craved leave to refer to it when produced:” the deed was protected. So Lord Eldon in *Princess of Wales v. Liverpool*, 1 Sw. p. 121 (and see Wigr. Pl. 356), referring to *Shaftesbury v. Arrowsmith* and *Burton v. Neville*, evidently considered that the plaintiff could not call for the instrument on which the defendant framed his title unless he made it a part of his answer (as to which see *post*, p. 255) a mere reference not being sufficient. So in *A. G. v. Corporation of London*, 2 M. & G. p. 260, Lord Cottenham: “If a defendant pleads a deed which constitutes his title he cannot be compelled to produce it.” The mere statement in an answer of the substance of a document the contents of which the defendant is not bound to disclose does not make him liable to produce the document itself: *Glover v. Hall*, 2 Ph. 484. In this case, considered also *post*, p. 261, under

the subject of "impeached documents," the plaintiff charged that by a certain deed only a life interest passed to the defendant's predecessor: the defendant asserted that an absolute interest passed and set out an abstract of the deed: Lord Cottenham protected it. This case, where his liability to disclosure of the contents was denied and resisted and not ordered, was contrasted with *Latimer v. Neate*, considered *post*.

The distinction in this (see *ante*, p. 251) respect between the different parts of the answer, that constituting the defence, and that constituting the examination or discovery—a document forming part of the answer.—This distinction was urged by Wigram, V. C. as counsel in *Hardman v. Ellames*, 2 M. & K. p. 749; and also in his book, Pl. 384, 386, 420, 345, 348, 407, 393, 413, 17. The judgment in *Hardman v. Ellames* took no notice of this argument: but the documents were as a matter of fact ordered to be produced as being a part of the defence (deeds declaring the uses of certain fines), and they were in fact referred to in that part of the answer which constituted the defence: see Wigr. Pl. 386. Lord Cottenham in *McIntosh v. G. W. R. Co.* 1 M. & G. 73, pp. 77, 78, refers to *Hardman v. Ellames*, and applies it to the case of a document referred to in that part of the answer which constituted the examination. Here the defendant after answering certain matters stated that he could not answer further than as appeared by certain documents which he scheduled and offered to produce, and then in a subsequent part of his answer he objected to produce them as privileged. Entirely different considerations arise in such a case. Assuming that the party is bound to give the information, he cannot insist upon the protection given to certain documents to relieve himself from giving it: see *Mornington v. Mornington*, 2 J. & H. 697, p. 705, and *post*, p. 365. In *McIntosh v. G. W. R. Co.* the plaintiff had by the offer to produce (see *Mornington v. Mornington*, pp. 700, 706) elected to give the information by production of the documents, and therefore they must be produced: but where as in *Mornington v. Mornington* a very similar case there was no such offer, no such election was deemed to be made, and no production was ordered, the proper course being to except to the answer for insufficiency. It is to be observed that Mr. Hare, in *Hare*, pp. 222—227, also points out this distinction between the different parts or functions of the answer, and remarks in respect to this particular question that the distinction has not always been sufficiently observed. He in fact considers the language of Lord Eldon in *Atkins v. Wright*, 14 Ves. p. 214, as to making the instrument part of his answer, and in *Princess of Wales v. Liverpool*, 1 Sw. pp. 121—122 (and see *Farrer v. Hutchinson*, 3 Y. & C. p. 691), and the decisions of *Marsh v. Sibbald* and *Evans v. Richard* (see these cases, *ante*, p. 253), as having application only to instruments referred to in that part of the answer which constitutes the examination or discovery as distinguished from that part which constitutes the defence and an inspection of which is necessary to make the answer perfect and so a part of the answer in that sense. See also the Irish cases of *Phelan v. Hamilton* and *Dundas v. Blake* (cited *ante*, p. 252) and *Hunt v. Elmes*, 27 Beav. 62, and *A. G. v. Lamb*, 3 Y. & C. 162, following *Latimer v. Neate*, *post*.

A case of *Latimer v. Neate*, 4 Cl. & F. 470: 11 Bligh, 112, may also be referred to in this connection. There it was held that where a defendant's liability to disclose the contents of a document had been established by the order of the court on exceptions, the plaintiff was not bound to be content with the defendant's statement of such contents but entitled to see the document itself to see whether the statement was correct: that in fact the proper stage at which to take the objection was on being required to disclose the contents (see *Glover v. Hall*, 2 Ph. p. 491, cited *ante*, p. 252); a disclosure of the contents resting on the same footing as actual production of the document: see also *ante*, p. 253. The following passage in the judgment explains the ground taken by the court (see this case also considered *post*, p. 259, in connection with the subject of impeached documents, the decision having been also based on other grounds). "If the defendant is entitled to that protection against discovery which he now seeks to enforce, the order was wrong

in allowing the exceptions, because a defendant may be bound to state in his answer and describe the documents: he may be compelled to admit he has such documents in his possession, but not compellable to state the contents if he is entitled to protect himself by any rule which prevents a plaintiff asking for the production of the documents. If he professes to set out the document the plaintiff has a right to see whether he has stated it correctly or not (see also *ante*, pp. 244, 253). Therefore to protect himself against the liability to produce the document he should take his stand on the interrogatory which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, I have the deeds in my possession but you do not entitle yourself by the proceedings to see the contents of the documents. If the defendant chooses to pretend to give a discovery the plaintiff is not bound to take that representation but is entitled to see the documents": 4 Cl. & F. pp. 84, 85: 11 Bligh, p. 154. The reasons for this decision are disapproved in Wigr. Pl. 439. First as a matter of principle, on the ground that where in the case of discovery which a defendant is not bound to give the appropriate mode of taking the objection was by answer, the right to object by this mode should remain except so far as it has been actually destroyed by answer: secondly on the ground that an ingenious plaintiff might by unfounded charges give the appearance of discovery to such a statement of the contents of a document made in reality for the purpose of the defence, and so cripple the defence by preventing the defendant from setting out his case as he might think best, or by subjecting him to the production of a document which the rule of equity entitled him to withhold, whether as being the instrument on which he relied, or which corroborated or supported his case.

An admission of possession was necessary, the mere reference not being held equivalent to such an admission: *Hardman v. Ellames*, 2 M. & K. p. 756: *Darwin v. Clark*, 8 Ves. 158: *Princess of Wales v. Liverpool*, 1 Sw. p. 121: *Erskine v. Bize*, 2 Cox, 226: *O'Connell v. Denny*, 2 Ir. Eq. Rep. 246: even if the document were set out: *Southwell v. Daly*, 10 Ir. Eq. Rep. 7.

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(c) *As to the Right of the Plaintiff to see Documents which he sought to have set aside or reformed, or which he otherwise impeached, or which he specially charged to support his Case.*

These documents did not (see *ante*, pp. 251—252) fall within the doctrine of *Hardman v. Ellames*, necessitating the production of documents stated or referred to in the answer: see *ante* (b).

As to documents which the plaintiff only specially charged to support his case there never was any real doubt but that



by properly denying the plaintiff's charges the defendant was in just as good a position for resisting production as if no such charges had been made : see for instance *Smith v. Beaufort*, 1 Ha. p. 523: *Glover v. Hall*, cited *post*, p. 261: and *post*, pp. 505—506, discussing the point more fully: a contrary practice being as unjust as a contrary practice in the case of documents which it was the object of the suit to impeach, see *post*.

As to documents which it was the object of the suit to set aside reform or impeach (see as to documents suspected to be forged *ante*, p. 246), there was some doubt whether the plaintiff was not entitled to see them in spite of the defendant's denial of the allegations on which the claim was founded. But it was ultimately established that the plaintiff had no special right to see such documents; that the question was to be determined by the general rules of the court and not by any rules peculiar to the cases themselves: that the object of the suit could not alone determine the plaintiff's right to discovery in cases of that kind: that the right to production must depend on the answer: that by affecting to impeach a deed or agreement (but see as to an agreement *post*, p. 266, referring to *Rapson v. Cubitt*) the plaintiff could not acquire a right to see it if the grounds of the impeachment were denied by the answer: see Wigr. Pl. 311—313: Dan. Ch. Pr. 1688—1689: *A. G. v. Thompson*, 8 Ha. pp. 113—114: *Crisp v. Platel*, cited *post*, p. 261: *Bassford v. Blakesley*, cited *post*, p. 261: *Dendy v. Cross*, cited *post*, p. 262: *Tyler v. Drayton*, cited *post*, p. 261: and generally the cases cited *post*, p. 261 to p. 263. The injustice of a contrary practice has often been pointed out. A party would invariably make a charge of that nature however unfounded in order to procure inspection of the document: see Wigr. Pl. 311, 313: Dan. Ch. Pr. 1688—1689: *Republic of Costa Rica v. Erlanger*, cited *post*, p. 262: *Crisp v. Platel*: *Smith v. Beaufort*, 1 Ha. p. 523: and see *post*, p. 505.

The following cases are those which were relied on in support of the contention that a plaintiff had an absolute

right to see documents which it was the object of the suit to set aside reform or impeach :—

In *Beckford v. Wildman*, 16 Ves. 436, p. 438, Lord Eldon says, "Where the object of the suit is to destroy the deed the plaintiff has a right to have it produced and left in the hands of the clerk in court for inspection, &c. as from the right to have it set forth in the answer (but qu. as to any such right as this) the consequence follows that the instrument itself should be before the court at the hearing": and see also p. 441 "on all occasions when its production may be necessary." In *Balch v. Symes*, T. & R. 87, p. 92, he says, "Where a deed is sought to be impeached the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it, for it is the object of the suit that the deed may be declared a nullity. A considerable question however may arise at what period\* of the cause the production can be compelled. *Beckford v. Wildman* was a suit to set aside two conveyances, and one of the grounds alleged was that there were material variations between the two deeds: a motion was therefore made that they might be deposited with the Master for safe custody. Lord Eldon though admitting that where there was reason to believe that an instrument would not be produced at the hearing and in a case of extreme necessity the court would take it out of a party's hands and keep it in its custody in order to insure its production at the hearing, or on any other occasions when its production might be necessary, see pp. 438, 441, and *Princess of Wales v. Liverpool*, 1 Sw. p. 125, (referring as an instance pp. 440, 441, to *Addison v. Walker*, a suit to reform a deed so as to make it accord with a certain draft where an order was made for deposit in court of the draft,) considered that the circumstances of the case would not warrant him in making any other order than for their production at the hearing: (see as to production for the purpose of safe custody *ante*, p. 172). *Balch v. Symes* was a suit by a client against her solicitor for the delivery up of certain title deeds and the cancellation of certain deeds of conveyance to him of her property. The application was that the deeds might be deposited for inspection, and the only ground on which it was resisted (and ultimately as to the deeds of conveyance the inspection was consented to) was a claim upon them by way of lien: and it was to this point (as to which see *post*, p. 263) that Lord Eldon addressed himself. An order for deposit, for the purpose of inspection, of the conveyances was made.

Neither of these cases were regarded in Wigr. Pl. 311 as sanctioning any such proposition as that a document which it is the object of the suit to impeach must of necessity be produced for the purpose of inspection. The actual decisions certainly do not support it nor is it clear that Lord Eldon ever meant to lay down any rule of such a nature.

In *Beckford v. Wildman*, p. 441, Lord Eldon (and see Hare, pp. 240—241) seems to question whether in such a case the impeached deed is to be considered as a title deed, meaning thereby within the protection afforded to title deeds (as to which see *post*, pp. 492—493). But the view put forward in Wigr. Pl. 313 is that as soon as a deed is executed it becomes the deed of the grantee and is subject to the same rules of production as any other of his title deeds (and so *Tyler v. Drayton*, see *post*, p. 261): otherwise a vendor or mortgagor would retain a running interest in the deed he had executed to

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\* See also an Irish case *Swift v. McTernan*, 13 Ir. Eq. 119, where, following *Beckford v. Williams*, an order on the defendant for production only at the hearing was made of a lease which it was alleged had been altered, the plaintiff's application for its production before trial for submission to witnesses being refused.



which he might give effect merely by seeking to impeach it.\* These considerations however did not apply where the document sought to be impeached was only an agreement: see *Rapson v. Cubitt*, cited *post*, p. 266.

The only other case which lent any support to the proposition was *Neate v. Latimer*, 2 Y. & C. 257. The judgment of the Lord Chief Baron, pp. 262—263, certainly contains passages which tend in that direction. He suggests for instance a case where a mortgagor (see as to a mortgagor's right to discovery *post*, p. 542) charges that the mortgage deed has been falsified by inserting a larger sum than he ever received, or a case where a second mortgagee charges that the first mortgagee and mortgagor have colluded to induce him to lend money on the faith of a certain sum only being due on the first mortgage, and that now a larger sum is alleged to be due: in each of which cases the Lord Chief Baron considered that production should be ordered as evidence of the fraud. The suit was brought by a judgment creditor to impeach an assignment made by the debtor to the defendant and to obtain payment out of property comprised in the assignment, the plaintiff however offering to repay the defendant any monies actually paid by him to the debtor on such assignment, and therefore making the suit virtually one for redemption against a defendant setting up an absolute title: (see *Glover v. Hall*, 2 Phill. p. 491.) An order was made for production of the assignment mainly from the point of view above stated (and partly also, p. 263, on the ground that as it must be produced at the hearing it might as well be produced at once, as to which see *ante*, p. 151). This order was affirmed in the House of Lords, 11 Bligh, 112, but on totally different grounds. The decision rested, as was there, p. 156, and also subsequently in *Glover v. Hall*, 2 Ph. pp. 490—491 explained (and see Wigr. Pl. 312, 313), on the ground that the defendant's answer was evasive and contradictory and that his liability to set out the contents of the deed in his answer having been established by an order of the court its production was a matter of course (as to which see *ante*, p. 255): cases like *Beckford v. Wildman* and *Balch v. Symes* having (see p. 149) nothing to do with the ratio decidendi.

All these cases together with *Pilkington v. Himsworth*, cited *ante*, p. 249: *Kennedy v. Green*, cited *post*, p. 261: *Fencott v. Clarke*, cited *post*, p. 261: and *Tyler v. Drayton*, cited *post*, p. 261: were referred to in Wigr. Pl. 311—313, and the above conclusion arrived at.

The denial of the charges of course only left matters as they would have been if no such charges had been made so far as regards actual production of the document, that is to say protection must still have been claimed for it in the ordinary way as exclusively evidencing or relating to his own case: see *post*, p. 487. According to the phraseology adopted in Wigr. Pl. 403, and see *post*, p. 483 n. where a purely defensive document was impeached its defensive character was preserved by denying the impeaching statements and lost by failing to meet them.

In order to entitle himself to withhold from production a

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\* The views put forward in Wigr. Pl. 314, in partial continuation of this point are discussed in another place, see *post*, p. 483 n.

document which the plaintiff sought to set aside or reform or otherwise impeached or which he specially charged to support his case, the defendant must negative or meet every allegation made by the plaintiff as foundation for his claim or charge. It was not enough to negative generally the claim or charge: *Crow v. Tyrrell*, 2 Mad. p. 409: *Evans v. Harris*, 2 V. & B. 361: *Hardman v. Ellames*, 5 Sim. p. 650; Sugd. V. & P. 789—790: Redes. Pl. 239: *Jones v. Davis*, 16 Ves. pp. 264—265. A mere general averment may be only a legal conclusion which the party conceives may be drawn: *Harris v. Harris*, 3 Ha. p. 453. For instance it was not enough to deny notice generally: the circumstances and facts alleged as evidence of notice must have been denied: *Senhouse v. Earl*, 2 Ves. 450: *Radford v. Wilson*, 3 Atk. 815. Every fact charged from which the court would construe notice must have been denied: otherwise the party was judging for himself what was constructive notice, whereas it was for the court to do so: *Jerrard v. Saunders*, 2 Ves. jun. pp. 187—188: and see *post*, p. 537, as to a purchaser for value without notice. See also *post*, p. 505, as to the position of a party where his opponent has made charges as to a document inconsistent with the view that they exclusively evidence or relate to his own case.

Where the allegations were not satisfactorily met production would be ordered: *Kennedy v. Green*, cited *post*, p. 261: or where they were admitted and explained: *Cannock v. Jauncey*, cited *post*, p. 262: so where there were suspicious circumstances: see *Bassford v. Blakesley*, cited *post*, p. 261: *Fencott v. Clarke*, cited *post*, p. 261.

So it seems to have been considered in some cases that where the plaintiff and defendant were in the relation of client and solicitor this constituted a ground for ordering production: see *Davis v. Parry*, and *Patch v. Ward*, cited *post*, p. 263 (but see *Dendy v. Cross*, cited *post*, p. 262, *contra*): and *Balch v. Symes*, cited *post*, p. 263.

It may be suggested that where the ground of impeachment is *dehors* the deed, as for instance where it is founded on the relationship between the parties, its production may

be immaterial: see Wigr. Pl. 311: and *Republic of Costa Rica v. Erlanger*, arguendo, p. 41.

The following are the cases on the subject of this subsection: *Beckford v. Wildman*, *Balch v. Symes* and *Latimer v. Neate* have been set out and considered *ante*, pp. 258, 259: other cases where charges affecting particular documents have been made are cited and discussed *post*, pp. 505—508.

In *Tyler v. Drayton*, 2 S. & S. 309 (and see *ante*, p. 254) a purchase was impeached on the ground of fraud and inadequate consideration; the defendant denying these charges, the purchase deeds were protected, being regarded apparently as evidence not of the plaintiff's but of the defendant's title.

In *Crisp v. Platel*, 8 Beav. 62, a suit to redeem certain mortgages but impeaching the validity of one mortgage, Lord Langdale refused to order inspection of the last-mentioned mortgage deed, for, if a mere allegation that a mortgage was bad and was contested would entitle a plaintiff to production, a defendant might be deprived in every case of his right to resist production.

In *Glover v. Hall*, 2 Ph. 484, the plaintiff claimed a term of years in some property, alleging that the deed by which the defendant asserted the term to have passed to the person through whom he claimed conveyed only a life interest therein. The defendant, denying the plaintiff's allegations setting forth the contents of the deed in his answer (as to which see *ante*, p. 255) and saying that the document evidenced his own title and not the plaintiff's, was protected from producing the deed: see also *Stroud v. Deacon*, 1 Ves. 37, cited *post*, p. 505.

In *Bassford v. Blakesley*, 6 Beav. 131, p. 133, Lord Langdale considered that though, where the bill alleged that deeds had been obtained by fraud, and the answer denied the fraud and stated the deeds, the plaintiff was not entitled to an order for production, yet the court must look to the circumstances of the case and that it was not necessary in order to entitle the plaintiff to an order for production that the defendant should admit the fraud. Accordingly in this case, where it was being sought to set aside conveyances alleged to have been made by an old man (the plaintiff) to his nephew the defendant almost without consideration, it was considered reasonable looking at the circumstances of the case to order their production. So in *Fencott v. Clarke*, 6 Sim. 8, a suit to set aside a voluntary conveyance obtained from a person of unsound mind, production of the conveyance was ordered.

Where a plaintiff sought to impeach a deed, which was in fact an assignment of a mortgage, on the ground that when she signed the receipt at the back the deed was folded down so that she could not see what she was signing, and alleged that if it were produced it would so appear, the defendant, though he denied all notice of any fraud having been practised on the plaintiff, and claimed to be a mortgagee of the property, was ordered to produce the deed on the ground that certain suspicious circumstances were alleged to appear on the back of the deed itself which would tend to show the fraud, and there was no denial of notice of these circumstances on the part of the defendant such as a purchaser for valuable consideration (see *post*, p. 538) must make in respect of all allegations tending to show notice of the fraud: *Kennedy v. Green*, 6 Sim. 6: and see Wigr. Pl. 311.

*Phillips v. Evans*, 2 Y. & C. C. C. 648, was a suit for redemption and account against mortgagees (executors of the original mortgagee) in possession. The plaintiffs alleged that the mortgagee had notice of the mortgagor's insolvency on taking a certain further charge, and that such notice would

appear from recitals in the writing of further charge and from the date thereof and from endorsements made upon the original mortgage: the defendants stated their ignorance whether the mortgagee had notice and set out the memorandum endorsed on the mortgage. Knight Bruce, V. C. gave the following judgment: "This is a bill filed to redeem a mortgage, and it is not disputed that the only question is what amount the plaintiff is to pay, which depends on the contents of the indorsement upon the mortgage deed and the time when the indorsement was executed. The defendant sets out the instrument which appears to be expressed in the first person and to be contained in a few lines which he says are the effect of that instrument. Considering the manner in which the document is set out (see *Hardman v. Ellames*, ante, p. 251) the nature of the suit and the circumstances relating to the insolvency of the mortgagor including the date of the indorsement, I think that this is a case in which the plaintiff should see the indorsement."

In *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33, where the plaintiffs impeached certain accounts between themselves and the mortgagees and in fact denied that there was anything due at all, Malins, V. C. refused to order production of certain bonds held on behalf of the mortgagees by a defendant, who was being cross-examined before a special examiner, on the ground that great mischief might be occasioned by their production and probably no benefit, and that it was a case in which according to *Bassford v. Blakesley*, (ante, p. 133), he might exercise his discretion.

Where a mortgagee purchased the equity of redemption in the mortgaged property from a trustee under circumstances which affected him with notice of a trust, the cestui que trust, offering to redeem him, was held entitled to production of the conveyance: *Smith v. Barnes*, L. R. 1 Eq. 65.

In *Jones v. Jones*, Kay, App. p. 6, production was ordered (the circumstances being very special) of a deed which the defendant asserted to be an absolute conveyance to himself but which the plaintiff alleged to have been deposited by way of security only for money which had since been paid off.

On the other hand in *Dendy v. Cross*, 11 Beav. 91, where the plaintiff charged that a certain deed purporting to be an absolute assignment of property to the defendant (his solicitor, see ante, p. 260) was in reality made on an understanding that the property was to be restored to him in certain events, and the defendant denied the charge, production was refused.

In *Cannock v. Jauncey*, 1 Dr. 427, a suit for redemption by a second mortgagee against a first mortgagee (by transfer) who claimed to tack a judgment debt, the plaintiff relied on a conveyance containing a recital that the judgment debt had been paid off: the defendant set out the recital in his answer, and explained it by saying that the object of the recital was only to clear the estate and that the deed would therefore not assist the plaintiff (see as to this point *Smith v. Beaufort* discussed post, p. 506). It was held that *prima facie* the plaintiff was entitled to see the deed, and that though the defendant by virtue of his position as mortgagee (see post, p. 544) might withhold its production yet inasmuch as the mortgage money had been paid off (the money had been paid since the institution of the suit) such right in him as mortgagee no longer existed, and therefore there was nothing to interfere with the plaintiff's title to have inspection of it.

In *Nesom v. Clarkson*, C. P. Coop. 93, the defendant, a purchaser for valuable consideration without notice, was ordered to produce a deed anterior to the purchase deed containing recitals set out in the answer and relied on by the plaintiff as showing express or implied notice. In *Addis v. Campbell*, 1 Beav. 258, a suit to set aside a purchase of a reversionary interest by a person through whom the defendant claimed, the defendant asserting that the purchase was *bonâ fide* and fair, production of the conveyance and other documents was ordered, an affidavit being allowed to be read for the purpose of verifying a letter referred to in the bill and neither admitted nor denied by the answer from which it would appear that the purchaser was affected with notice of a previous transaction which might invalidate the purchase. See as to a purchaser for value without notice, post, p. 535.

Where a party entitled to a legacy secured by a term of years brought an action against the trustees of the term and the mortgagees from them of the term, charging the latter with such knowledge as made them parties to a breach of trust on taking the mortgage, and asking that they should be postponed to his claims in respect of the legacy, the mortgagees denying the charge, no production of the mortgage was ordered, for it was not suggested that the deed contained anything to support the plaintiff's case, nor was there anything to take it out of the ordinary rule (see *post*, p. 543) protecting a mortgagee from producing his deeds: *Howard v. Robinson*, 4 Drew. 522, also discussed *ante*, p. 252.

In *Greenwood v. Rothwell*, 7 Beav. 291, a case of some complication production of various deeds was refused.

See also *Addison v. Walker*, cited *post*, pp. 538, 545.

In a suit by a party against his solicitor to set aside a mortgage made to him on the ground of pressure and surprise production should it was considered be ordered in spite of the alleged pressure and surprise being denied, the professional relationship constituting a ground for taking it out of the ordinary rule of mortgagor and mortgagee: *Davis v. Parry*, 4 Jur. N. S. 431. In a suit to open a foreclosure decree and for redemption against a person who had acted as solicitor for the plaintiff (mortgagor) in a mortgage transaction and also for the mortgagee and had subsequently acquired the mortgage by transfer, it was held that he was not entitled to resist the production of deeds prepared by him as such solicitor as if he were in the position merely of a third party: *Patch v. Ward*, L. R. 1 Eq. 436 (see this case also cited *post*, p. 382): see however *Dendy v. Cross*, cited *ante*, p. 262, where production was withheld in spite of the relationship of solicitor and client. In *Balch v. Symes*, T. & R. 87 (see *ante*, p. 258) Lord Eldon, p. 92, considered that no lien of a solicitor could entitle him to withhold from production at some period of the cause a document which it was the object of the suit to impeach: and on the same page he says "where a person executes a deed in favour of her own solicitor and reserves to herself a life interest and a power of revocation it is quite impossible for the solicitor to refuse to produce the deed: it is his duty to leave a counterpart of it in the hands of his client . . . so with respect to a will, an instrument which may be altered even in articulo mortis, and on which a solicitor can have no lien: see as to a solicitor's lien *ante*, p. 205: and especially in connection with the above passage, *ante*, p. 205.

As to documents subordinate or subsequent to an impeached document.

It was considered in *Jones v. Jones*, Kay, App. p. 9, that *A. G. v. Ellison*, 4 Sim. 238, established the proposition that, where in cases of this kind it was considered proper to order production of impeached documents, all that proceeded from them and rested upon that foundation must be produced just as the original documents themselves; and accordingly production was ordered of a particular receipt which was deemed to have become a part of the title to the property which was impeached. But see *ante*, p. 23, as to the decision in *A. G. v. Ellison*.

### III. *The old Common Law Practice as to Documents relied on as the Foundation of the Action or of the Defence.*

At common law the practice ultimately was to allow a party inspection of any document relied on by his opponent as the

foundation of the action or of his defence as the case might be, whether actually stated or referred to or not. This practice was altogether independent of the powers conferred on the common law courts by the C. L. P. Acts. It had its origin partly in the practice of profert and oyer and partly in what was called the common law equitable jurisdiction.

### Profert and oyer.

The practice of profert and oyer, which was abolished by the C. L. P. Act, section 55, see *post*, p. 265, was to the following effect. Where a party relied upon an instrument under seal in his pleading and it was in his possession he was bound to make profert of it, that is to say he must have averred that he brought it into court: the other party could then demand oyer of it, that is to say have it read to him. As a matter of fact the deed was not brought by the party into court or read to the other party, but a copy was given to him: *Penarth, &c. Co. v. Cardiff, &c. Co.* 7 C. B. N. S. p. 824: Tidd, Pr. 586: Day, C. L. P. 90—91: *Turquand v. Hennett*, 7 C. B. 179: note in 6 M. & G. p. 274: Lush, Pr. 836: 2 Saunders, 712: *Read v. Brookman*, 3 T. R. 151: *Princess of Wales v. Liverpool*, 1 Sw. pp. 116, 117, 119, 124.

In *Hunt v. Hewitt*, 7 Exch. p. 243, it is stated that originally it applied to some instruments only, but that by usage it was with certain conditions extended to all. It appears however to have been confined to instruments under seal, such as deeds letters testamentary or letters of administration: see Day, C. L. P. 90: 2 Saund. 712—713.

### The equitable common law jurisdiction.

By the equitable jurisdiction (originated by Lord Mansfield according to Lord Eldon, *Princess of Wales v. Liverpool*, 1 Sw. p. 120, to save the expense of resorting to equity: but see *Threlfall v. Webster*, 1 Bing. p. 173: or dating back to Charles II. according to other authorities: see *Pritchett v. Smart*, 7 C. B. p. 630) a party was allowed pending an action to inspect or have copies of certain documents in his adversary's possession where it was necessary he should so inspect or have copies of them in order to the framing of his pleading or the maintaining of his claim or defence: the documents being documents to which he was a party either in fact or in interest, and held by the adversary upon a trust express or implied to produce them when necessary for the use of the party demanding inspection: Lush, Pr. 837, 839: Arch. Pr. 1164—1165: Day, C. L. P. 297: *Pickering v. Noyes*, 1 B. & Cr. 263: *Powell v. Bradbury*, 4 C. B. p. 542: *Devenage v. Bouverie*, 8 Bing. 1: *Pritchett v. Smart*, 18 L. J. C. P. p. 212: 7 C. B. p. 628: *Hunt v. Hewitt*, 7 Exch. p. 243: *Threlfall v. Webster*, 1 Bing. p. 163: *Bateman v. Phillips*, 4 Taunt. 161: 2 Saund. 224—227: *Owen v. Nickson*, 3 E. & E. p. 607: *Hodgson v. Warden*, 1 D. & L. 286.

This practice might have been discussed *post*, in Chapter VII. in connection with documents in which the applicant has an interest of the nature of property or such an interest as that the holder of them is deemed to hold them as a quasi trustee for or on behalf or for the benefit of the applicant: and see the note to *R. v. Newcastle*, referred to *post*, p. 281: it is however more convenient to review it here.

The party must be a party in interest: *Smith v. Winter*, 3 M. & W. 309: *Ratcliffe v. Bleasly*, 3 Bing. 148, p. 150: *Devenage v. Bouverie*, 8 Bing. p. 3: *King v. King*, 4 Taunt. 656. Inspection would not therefore be allowed of a deed which the applicant had refused to execute, though otherwise of the



draft agreed upon between the parties: *Ratcliffe v. Bleasly*. But the party holding it need not have executed it: *Morrow v. Saunders*, 1 B. & B. 318.

Originally it seems to have been confined to cases where there was only one copy or part of an instrument and the party held it as a quasi trustee: *Doe d. Child v. Roe*, 1 E. & B. p. 284: *Price v. Harrison*, 8 C. B. N. S. pp. 634—637: *Neale v. Swind*, 2 Cr. & J. 278: Lush, Pr. 839. Where there were two parts executed interchangeably or more than one copy and the duplicate counterpart or copy was lost or destroyed, the strict rule was that there was no right to inspection: Lush, Pr. 839: *Street v. Brown*, 6 Taunt. 302: *Woodcock v. Worthington*, 2 Y. & J. 4: Archb. Pr. 1165. But a lessor was held entitled to inspection of a lease on production of an affidavit that he had no counterpart: *Doe d. Avery v. Langford*, 21 L. J. Q. B. 216: *Doe d. v. Slight*, 1 Dowl. 163: *Doe d. v. Roe*, 1 M. & W. 207: but see *Portsea v. Goring*, 4 Bing. 152: *Griffin v. Smythe*, 8 Dowl. p. 493.

Subsequently it was extended so as to include every case where the party seeking inspection had an interest in the document: *Price v. Harrison*, 8 C. B. N. S. p. 634; and see *Pritchett v. Smart*, 18 L. J. C. P. p. 212: 7 C. B. p. 628. It was not confined to instruments inter partes: it extended (ultimately see *Bluck v. Gompertz*, 7 Exch. p. 70 and *Threlfall v. Webster*, 1 Bing. p. 163 and *post*, p. 268: but earlier according to *Princess of Wales v. Liverpool*, 1 Sw. pp. 116—117) to bills notes and other securities: Lush, Pr. 839; and see *Taylor v. Quinlin*, 2 Ir. Jur. 72, Q. B. (inspection by defendant sued as maker of a promissory note).

The word "trustee" was not used in its strict technical sense but was applied wherever the court saw that the party had in equity and justice an interest in the document: *Price v. Harrison*, p. 633: and see *Owen v. Nickson*, 3 E. & E. p. 607.

An agent was considered to be in this sense a trustee for his principal of books in which entries were made of business transacted for the principal: *Jones v. Palmer*, 4 Dowl. 446: Archb. Pr. 1165: a broker for instance: *Browning v. Aylmer*, 7 B. & C. 204: and see *Pritchett v. Smart*, 7 C. B. pp. 628—629.

The practice of profert and oyer was abolished by the C. L. P. Act, 1852, sect. 55: Day, C. L. P. 90—91. But it was held that the intention of the act was merely to abolish the particular form of procedure and not to diminish the right to inspection, and that this right would be exercised under the equitable jurisdiction which remained untouched by the act: *Penarth, &c. Co. v. Cardiff, &c. Co.* 7 C. B. N. S. pp. 823—826: *Child v. Roe*, 1 E. & B. p. 285: *Webb v. Adkins*, 14 C. B. 401 (where the action was stayed until production of the probate). Accordingly in the first-mentioned case, an action for diverting water from a stream, the defendants were ordered to allow inspection of a deed on which they relied as giving them the right to take the water, for profert must have been made of it.

Under the equitable jurisdiction thus enlarged in its scope it was held that whenever a party relied on an instrument whether under seal or not as the foundation of his claim or



defence the adversary was entitled (or "the court has power" as put in *Child v. Roe*, 1 E. & B. p. 284) to inspect it: *Price v. Harrison*, 8 C. B. N. S. p. 635: *Penarth, &c. Co. v. Cardiff, &c. Co.* 7 C. B. N. S. pp. 825, 828: unless the court saw that the application was made for an improper purpose: *Owen v. Nickson*, 3 E. & E. p. 608: though involving a disclosure of the party's own title: *Price v. Harrison*, p. 635; and though the instrument was not actually referred to in the pleading, if in fact and when it appeared that it was the foundation of the action or defence: *ibid.* p. 636, where the agreement must have been in writing to satisfy the Statute of Frauds: *ibid.* p. 635 commenting on *Shadiceil v. Shadiceil*, 6 C. B. N. S. 679 and *Charnock v. Lumley*, 5 So. 438 where, as being within the spirit though not the letter of the rule, inspection was ordered of an agreement by which the rights of the parties would be controlled: (see also a chancery case of *Rapson v. Cubitt*, 7 Jur. 77, cited *ante*, p. 259, a suit to set aside an agreement for the compromise of a previous action between the same parties where Knight Bruce, V. C. was of opinion that according to all principle and authority the plaintiff was entitled to inspect it and also the draft, for it contained terms to be performed by both parties): but inspection would not be ordered if it was a mere surmise and suggestion by the party that he believed the opposite party would rely on certain letters: *Penarth, &c. Co. v. Cardiff, &c. Co.* p. 825: *Price v. Harrison*, pp. 635—636 commenting on *Shadiceil v. Do.* where, the defendants, executors, pleading that the agreement on which the action was brought had been rescinded, the plaintiff was refused inspection of a letter on which he believed they intended to rely: and see *Jessel v. Millinger*, 1 M. & Sc. 607: and *Jones v. Hargreaves*, 29 L. J. Ex. 368: and see *post*, p. 269.

Both in *Penarth, &c. Co. v. Cardiff, &c. Co.* and in *Price v. Harrison* the principles laid down by Lord Cottenham in *Hardman v. Ellames* (see *ante*, p. 251) are referred to and approved as being in harmony with the common law practice: but *qu.* see *ante*, p. 254.

In *Price v. Harrison* the documents which the defendant was allowed to

inspect were certain letters written by him to the plaintiff which he believed contained the agreement on which the action was brought, of which he had no copies, and which it was material he should see in order to enable him to plead to the action: if they were only evidence of the agreement they fell within the rule: *Erle, C. J. ibid.* p. 633. The writer had a right to say, "Let me see my letter in order to see what contract I have entered into:" such a case was as strong a case of trusteeship in the sense in which this word was used as could well be conceived. See *Benjamin v. Saulez, post*, p. 268.

So a defendant to a breach of promise action was entitled to see letters written by him containing the alleged promise: *Stone v. Strange*, 34 L. J. Ex. 72: and see other cases, *post*, p. 515: and see *Price v. Harrison*, p. 629, disapproving *Goodliff v. Fuller*, 14 M. & W. 4, where the defendant was refused inspection of letters from the plaintiff to himself alleged to contain a release of the promise. In an earlier case, *Hamer v. Sowerby*, 3 L. T. 734, inspection was refused as being in the nature of a fishing application to see whether the plaintiff had a cause of action.

A defendant was allowed to see a letter, of which he had no copy, written by his agent, constituting the agreement on which the plaintiff sued, the latter being deemed to hold it as trustee: *Blogg v. Kent*, 6 Bing. 614.

Inspection of the letter or memorandum of guarantee on which the plaintiff sued was ordered in *Bluck v. Gompertz*, 7 Exch. 67.

Inspection of the written assents to a deed of inspectorship under section 192 of the Bankruptcy Act, 1861, was ordered in favour of a creditor against the trustees on an issue under a writ of fi. fa., the assents being by virtue of the act binding on all the creditors and being in effect part of the deed: *Andrew v. Pell*, L. R. 2 C. P. 251.

Inspection of the lease by the lessor has been allowed in ejectment actions brought by the lessor on forfeiture for breach of covenant (but see *post*, pp. 337, 346, as to discovery exposing a party to forfeiture) where he had no counterpart: *Doe d. v. Roe*: *Doe d. v. Slight*: *Avery v. Langford*: all cited *ante*, p. 265: so of an indorsement on the lease relating to an increase of rent in an action therefor: *Mayer of Arundel v. Holmes*, 8 Dowl. 118. So the lessee has been allowed inspection: in an ejectment action for breach of covenant in a lease against the person in possession the latter was allowed to inspect the lease, for it must be assumed or was even admitted that he was in possession under the lease and was not a stranger: *Child v. Roe*, 1 E. & B. 279: see also *Doe d. Courtail v. Thomas*, 9 B. & C. 288: and *King v. King, post*, p. 269. In an action by a tenant against the landlord the tenant was allowed to inspect the agreement under which he held of which there was only one copy: *Reid v. Coleman*, 2 Dowl. 354. In an ejectment action, the question being whether certain lands were comprised in the defendant's lease, he was allowed to inspect the counterpart lease, the lease being lost: *Barry v. Scully*, Ir. Rep. 6 C. L. 449.

In an action for detinue of title deeds the defendant pleaded an equitable mortgage by deposit, and in his answers to interrogatories disclosed the possession of a memorandum of such deposit; inspection was ordered on the ground that he must be considered a trustee of it, no other part being in existence, and that the defence was rested on it: *Owen v. Nickson*, 3 E. & E. 602.

It was considered that where title deeds and trade books were in question a stronger case for production must be made out than in the case of other documents such as letters, and that an order would only be made when the interests of truth and justice required it: see *Price v. Harrison*, 8 C. B. N. S. p. 634: and see generally as to title deeds, *post*, p. 492.

In actions by allottees of shares against members of a provisional or managing committee to recover back deposits they were held entitled to see the subscribers' agreement which they had signed and the parliamentary contract: *Steadman v. Arden*, 15 M. & W. 587: *Ley v. Barlow*, 1 Exch. 800. A secretary of a company was allowed inspection of minute books in an action to recover his salary: *Shaw v. Holmes*, 3 C. B. 952. The court refused

to extend the rule so as to allow former directors of a company to see the company's books in an action against them by the company for making false entries therein, they not saying that inspection was necessary for their defence: *Imperial Gas, &c. Co. v. Clarke*, 7 Bing. 95: see also *Birmingham, &c. Co. v. White*, referred to *post*, p. 293: and generally as to inspection of documents of a company or other corporation by a member, see *post*, p. 287.

The following are old cases: *Fox v. Jones*, 7 B. & C. 732 (writ of hab. corp. and return); *R. v. Sheriff of Chester*, 1 Chit. Rep. 476 (writ in sheriff's hands); *Cooper v. Jones*, 2 M. & Sc. 202; *Whitbourne v. Pottifer*, 4 M. & Sc. 182 (books containing contracts); *Laurence v. Hooker*, 5 Bing. 6; *Rundle v. Beaumont*, *Rowe v. Howden*, 4 Bing. 537, 539 (shipping documents); *Twizell v. Allen*, 5 M. & W. 337 (action by shipowner against owner of goods for proportion of general average—the statement of general average loss was ordered to be produced, but not the documents from which it was made up: see further *post*, p. 515); *Blakey v. Porter*, 1 Taunt. 386 (assignment of lease in hands of assignee by assignor); *Evans v. Delegal*, 4 Dowl. 374 (case and opinion in order to plead negligence to action by attorney); *Pickering v. Noyes*, 1 B. & C. 262 (title deeds refused); *Smith v. Winter*, 3 M. & W. 309 (deed giving time to the debtor refused in favour of the surety); *Powell v. Bradbury*, 4 C. B. 541 (report in newspaper refused); *Bousfield v. Godfrey*, 5 Bing. 418; *Traver v. Collins*, 2 Cr. & J. 627.

As to whether inspection was allowed on a suggestion of forgery (see *ante*, pp. 246—247, as to the equity practice: see as to protection on the ground of liability to a criminal prosecution, *post*, p. 312).

In earlier cases it seems to have been considered that a suggestion of forgery was no ground for inspection: Lush, Pr. 837: for instance of the bill on which the action was brought: *Hildyard v. Smith*, 1 Bing. 451; *Chetwynd v. Marnell*, 1 B. & P. 271. In this last case the ground for the decision seems to have been that the plaintiff must eventually produce the document if he meant to succeed, but that the court would not compel a party to expose himself to a prosecution on a capital felony by ordering production. But in the note to *Thomas v. Dunn*, 6 M. & W. p. 274, this ground is criticised as inapplicable to a case where profert had been made and oyer craved as here. In a later case, *Woolner v. Devereux*, 9 Dowl. 673, it was held that a suggestion of forgery was a proper ground for ordering inspection, and so also where a defendant swore he had no recollection of having made a note or that it had been dealt with since execution. Inspection by a defendant and his witnesses was also ordered in *Thomas v. Dunn*. See also *Benjamin v. Saulez*, 1 R. 6 C. L. 16 (letters said to be not genuine by defendant).

Where a plaintiff charged that the defendant had obtained possession of certain bills by fraud, and that they were not satisfied, the defendant denying these charges, the court (not without hesitation) refused inspection: *Threlfall v. Webster*, 1 Bing. 161: see *Pilkington v. Himsworth*, cited *ante*, p. 249.

As to whether inspection would be allowed for the purpose of fishing out a case. See generally as to discovery with this object *ante*, p. 16.

In *Shadwell v. Shadwell*, 6 C. B. N. S. 679, p. 689, it is stated that inspec-

tion would not be ordered where it was sought not to support the party's own case but to see whether and by what means a defence could be made against him. In *King v. King*, 4 Taunt. 666, inspection of the lease was ordered in favour of the defendant in an action on the covenant for rent, though it was urged, and even it seems admitted, that it was only sought for the purpose of discovering some defect. This case was referred to in *Birmingham, &c. Co. v. White*, 1 Q. B. 282, p. 287, and supported on the ground that the party had there a clear and distinct property in the deed: and that in the case before the court, an action for calls, a shareholder had no such property in the minute books of the company (see as to this *post*, p. 290).

In that case, p. 286, Coleridge, J. asked whether there was any instance where inspection had been granted to enable a party to determine what plea to plead, inspection for the purpose of assisting him to plead a particular plea being different: so Patteson, J. p. 287: so Denman, C. J. p. 288, considered that the object with which the court ordered inspection was not that the party might be enabled to fish out a defence but if he had a defence that he might be furnished with the proper means of pleading it: see also *Rowe v. Howden*, 4 Bing. 539. And Wightman, J. in *Owen v. Nickson*, 3 E. & E. p. 607, says: "No doubt a plaintiff is not entitled to inspect a document making out the defendant's case solely; but here there is only one document and both plaintiff and defendant have an interest in it."

In a passage of a letter of Mr. Bosanquet referred to in Wigr. Pl. 400, the object of granting inspection at common law of a document stated in the pleadings was said to be to enable the party to determine what his case should be.

### Practice and stage of the action.

Application by a defendant would naturally be made generally before plea: see *Price v. Harrison*, 8 C. B. N. S. 617: *Child v. Roe*, 1 E. & B. 279: and see *ante*: though not always so: *Blogg v. Kent*, 6 Bing. 614. See as to discovery before plea or defence *ante*, pp. 160—161.

Inspection would not be ordered before action brought: Lush, Pr. 840: there must be an action pending: Arch. Pr. 1168: *Ex parte Partridge*, 1 H. & W. 350. Under special circumstances a defendant might be allowed to inspect the document on which the action was brought before declaration: see *Jones v. Hargreaves*, 29 L. J. Ex. 368.

Inspection would not be granted if it was a mere fishing application to see whether the document could be produced: Arch. Pr. 1167: Lush, Pr. 837.

A plaintiff would be allowed inspection before declaration for the purpose of drawing it if he could not declare without it: *Mayor of Arundel v. Holmes*, 8 Dowl. 118: *Rowe v. Howden*, 4 Bing. 539: *Harris v. Aldret*, cited *post*, p. 270: see generally as to discovery before declaration or claim *ante*, pp. 159—160.

An affidavit was generally filed stating the circumstances and the reason of the application, for instance that the instrument was in the adversary's possession that he could not safely proceed without it, &c.: Lush, Pr. 840: see further as to this affidavit *ante*, p. 154.

It seems also that a demand for inspection or a copy should have been made previously to applying to the court: see Arch. Pr. 1168: *Birmingham &c. Co. v. White*, 1 Q. B. p. 286: and see also *post*, p. 283: or at any rate the applicant if he succeeded would not be ordered to pay the costs of the application after such demand and refusal: see Lush, Pr. 840: *King v. King*, 4 Taunt. 666.

The expense of the inspection and copy were borne by the applicant: Lush, Pr. 840.

Part of a document might be covered up on an affidavit of irrelevancy: Arch. Pr. 1168.

Where other persons not parties had an interest in or corporeal possession of the documents.

In Lush, Pr. 840, it is stated that this jurisdiction was exercised in cases where other persons not parties had also an interest (of the nature of property) in the documents. It may be so. There may be a distinction where the applicant has a quasi property in the documents, see *ante*, p. 203, and *post*, p. 272. But the cases to which reference is made in support of the statement were cases where an order was made for inspection of a company's documents upon a party such as the secretary: *Shaw v. Holmes*, 3 C. B. 952: or a director or member of a managing or provisional committee: *Steadman v. Arden*, 15 M. & W. 587: *Ley v. Barlow*, 1 Ex. 800: who was deemed to have possession or control of the documents.

The possession of the party's attorney was regarded as the party's possession: *Steadman v. Arden*: *Ley v. Barlow*: *Morrow v. Saunders*, 3 Moo. 671: and see *Shaw v. Holmes*: see *ante*, p. 203, as to the attorney's lien. In one case, *Neale v. Swind*, 2 C. & J. 278, an order seems to have been made on the attorney himself: perhaps as being an officer of the court: see *Cocks v. Nash*, 9 Bing. p. 726: *Ex parte Bretter*, 1 Har. & W. 212.

Except as against an attorney an order would not be made against a person not a party to the action: *Cocks v. Nash*, p. 726; 2 Saunders, 224: Arch. Pr. 1167—1168. In two cases of a special character this was however done. In *Doe d. v. Roe*, 1 M. & W. 207 (doubted in Lush, Pr. 837) an order was made for a lessor, in an action against the lessee for forfeiture, to inspect the lease in the hands of a mortgagee of the lease who was not a party (see as to a mortgagee *post*, p. 542), his right being considered to be no better than the lessee his mortgagor. In *Harris v. Aldret*, 2 Ch. Rep. 229, a magistrate was ordered to give a plaintiff a copy of a deed which had been taken from him under a warrant of felony in order that he might declare on it. See also *Hodgson v. Warden*, 1 Dowl. & L. 286.

## CHAPTER VII.

INSPECTION OF DOCUMENTS IN WHICH THE APPLICANT HAS AN INTEREST IN THE NATURE OF PROPERTY, OR SUCH AN INTEREST AS THAT THE HOLDER OF THE DOCUMENTS IS DEEMED TO HOLD THEM AS A QUASI TRUSTEE FOR OR ON BEHALF OR FOR THE BENEFIT OF THE APPLICANT.

IN Wigr. Pl. 340, the learned author refuses to consider separately documents of this character on the ground that a party having an interest of this kind should only be entitled to their production by the machinery of discovery where they were required for the purposes of the suit, in which case he would be entitled to their production on general principles. Strictly this may be so: but the production of such documents even when sought by the machinery of discovery has in some cases been the subject of special observations: see in particular *Pickering v. Pickering*, 25 Ch. D. 247, cited *ante*, p. 236, where the party's oath as to the irrelevancy of portions of partnership documents was not accepted as conclusive. For this reason alone the subject seems to require special consideration. But further it is desirable to refer shortly to the practice in those cases where the production of such documents has been sought not by way of discovery, but either by way of relief in a regular suit for this purpose, see *post*, pp. 276—279: and Hare on Discov. p. 15: or under certain old powers possessed by the common law courts, see *post*, Sect. III.

Some cases are considered in this chapter as a matter of convenience in which the interest possessed by the applicant hardly reached an interest of this kind.

See also *ante*, p. 264, where the inspection of documents under the old common law equitable jurisdiction is considered, that practice being founded on the principle that the docu-

ment was held upon a trust to produce it when necessary for the applicant's use.

See also as to cases and opinions and other professional communications submitted taken and passing on behalf or in the interest of the party applying for their production, *post*, p. 379.

In cases of the kind now being considered the absence of a person having a property in a document would not perhaps necessarily constitute an objection to production, as in an ordinary case, see *ante*, pp. 198, 203, though in some cases, see *Bugden v. South*, *post*, p. 273, and *Lambert v. Rogers*, *post*, p. 277, it was so considered: (in *Chichester v. Donegal*, cited *post*, p. 278, the absent mortgagee held under a paramount power). See also *ante*, p. 270, in reference to cases under the common law equitable jurisdiction.

I. *Generally as to the Rights of Persons claiming under a Common Title (and in particular the Heir-at-Law and Heir in Tail, see post) to Inspection (a) by Way of Discovery, (b) Independently of Discovery.*

(a) *By Way of Discovery.*

Where (but see *Glover v. Hall*, *post*: and *post*, p. 274, as to the heir in tail) parties claim adversely but under a common title to a certain point, neither of them is entitled to inspect deeds in the possession of the other of a date prior to the time at which they become hostile on the ground of a common interest where there is no issue as to the prior title: see *Bennett v. Glossop*, 3 Ha. pp. 580—581, disapproving a dictum contra in *Collins v. Gresley*, 2 Y. & J. p. 492. An heir-at-law for instance cannot claim to see the deeds prior to the will as showing the ancestor's seisin, for that seisin is not in dispute: *ibid.* p. 580: *Rumbold v. Forteath*, 3 K. & J. p. 751: and see *post*, p. 274, as to the heir. They are not necessary to decide any question in the action, and he has no interest in them until he has proved the title: *Bennett v. Glossop*, pp. 580—581. The discovery from this point of view is merely consequential on his success in the action. *Bennett v.*



*Glossop* was a bill of discovery by the heir against the devisees of a feme covert in aid of an ejectment alleging the absence of any power of appointment in her or that it was not duly exercised by her: and the only issue was said to be the validity of the devise. The deeds of which inspection was refused comprised deeds conferring the power of appointment on the testatrix and limiting the property to the heir in default. In *Glover v. Hall*, 2 Ph. p. 492, however Lord Cottenham would have ordered production of the deed creating the term which the plaintiff claimed if she had connected herself with the grantee of the term: and see *Worsley v. Watson* referred to, and on this point not expressly disapproved by Lord Eldon in *Aston v. Exeter*, 6 Ves. pp. 490—491. In *Bolton v. Corporation of Liverpool*, 1 M. & K. p. 91, it was said (Lord Brougham) that production would be ordered of deeds under which both claimed; and so in *Burton v. Neville*, 2 Cox, 242, of deeds in which plaintiff and defendant had a common interest. These expressions however do not necessarily refer to cases of the kind now being considered.

Where there is a dispute as to the prior title production of any document necessary to determine it will be ordered. In *Bugden v. South*, 3 Jur. N. S. 783, plaintiffs, alleging themselves to be entitled to property under a settlement, filed a bill against the settlor and the trustee for inspection of the settlement and if necessary execution of the trusts. The defendants admitted that the plaintiffs had been entitled to an interest under the settlement, but alleged that such interest had been determined by a subsequent deed (produced by consent) executed in pursuance of a power in the settlement. The plaintiffs were allowed on motion to have inspection of the settlement on the ground that, their original interest under it being admitted, it was impossible to ascertain without its production whether their interest still existed or had been revoked. A previous application for inspection of the settlement had failed, the settlor not being a party, and Lord Romilly refusing to make any order in his absence: *Bugden v. Tylee*, 21 Beav. 545: (see as to this *ante*, p. 272). See

also *post*, p. 278, referring to *Chichester v. Donegal*: *post* as to the heir in tail: *post*, p. 280, as to a rector and patron: and *Hercy v. Ferrers* cited *post*, p. 279.

But the plaintiff is not entitled to see the deeds under which the defendant seeks to make title against the deed under which the plaintiff claims: see Lord Eldon in *Aston v. Exeter*, 6 Ves. p. 291, disapproving *Worsley v. Watson*. The heir in tail (see further *post*, as to the heir in tail) was not entitled to see the deed of recovery defeating the entail: *Burton v. Neville*, 2 Cox, 242; *Princess of Wales v. Liverpool*, 1 Sw. p. 121; *Shaftesbury v. Arrowsmith*, 4 Ves. 66; *Aston v. Exeter*, 6 Ves. p. 291; *Hylton v. Morgan*, *ibid.* p. 296; Wigr. Pl. 352, 356: see *post*, p. 275, as to *Bettison v. Farrington*, 3 P. W. 363, *contra*): and see *Plunket v. Carendish*, 1 R. & M. 713: unless such documents were brought within the principles discussed *ante*, pp. 255—256, as being part of the answer.

The heir in tail and at law (see also *ante*).

“An heir in tail has beyond the general right such an interest in the deed creating the entail that the court as against the person holding back the deed would compel the production of it”: Lord Loughborough in *Shaftesbury v. Arrowsmith*, 4 Ves. p. 70, cited in *Rumbold v. Forteath*, 3 K. & J. p. 750; *Bolton v. Corporation of Liverpool*, 1 M. & K. p. 92: and *Princess of Wales v. Liverpool*, 1 Sw. p. 121: and see Hare, p. 191. In *Shaftesbury v. Arrowsmith* the plaintiff, stating himself to be both heir-at-law and in tail and that he was ignorant whether he was entitled to any and what estates and could not know without inspection of all the deeds and writings, brought his bill for discovery of them and delivery up against the devisees in trust: on a motion for their production he was held entitled to inspection of any deeds referred to in the schedule to their answer creating estates in tail general, and, if necessary, to interrogate whether there were any such deeds. He is not entitled to a sweeping survey into all the family deeds which would be attended with danger and mischief, for some defect (as that the entail was not well barred) might be discovered which would show a title in some stranger to the prejudice of both parties: see *Shaftesbury v. Arrowsmith*, p. 71: and *Potter v. Atkins*, 3 Atk. 718: nor to the inspection of the deed of recovery: see *Burton v. Neville*: and other cases *ante*.

There is a distinction between the position of the heir-at-law and the heir in tail. The title of the heir is a plain one: and it is a legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will he has nothing to do with the deeds: *Shaftesbury v. Arrowsmith*, 4 Ves. p. 70, cited in *Rumbold v. Forteath*, 3 K. & J. p. 751; *Bolton v. Corp. Liverpool*, 3 Sim. p. 489; *Jones v. Jones*, 3 Mer. p. 172: and see *Tanner v. Wise*, 2 P. W. p. 296: and *ante*, p. 272. A will is no answer to an heir in tail: a will established is an answer to an heir-at-law: *Shaftesbury v. Arrowsmith*, p. 70. An heir-at-law cannot in that character call for the general inspection of deeds in the possession of a devisee: Lord Brougham in *Bolton v. Corporation of Liverpool*, 1 M. & K. p. 91: and see *Potter v. Potter*, 3 Atk. 718, a suit to establish and carry into execution the trusts of a will, where

the heir-at-law not controverting it applied for and was refused general inspection of all deeds and writings. In a note to Story Eq. Jur. p. 1493, it is urged that, though if it were clear that if the will were established the title of the heir would be gone the objection to a bill of discovery by the heir-at-law would be reasonable, yet in some cases it might depend on the terms of some deed or on the boundaries stated in different deeds whether he was disinherited or not: and see *Potter v. Potter*.

A customary heir was entitled to know whether there were any unsundered copyholds: *Jones v. Jones*, 3 Mer. p. 174.

In some early cases there seems to have been a disposition to allow a disinherited heir special privileges in the way of discovery. In *Suffolk v. Howard*, 2 P. W. 177, an heir in tail was allowed to inspect all deeds and writings in order that if anything had slipped the conveyance or if the entail were not well docked he might have the benefit of it. In *Bettison v. Farrington*, 3 P. W. 363, he was allowed to see the deed leading the uses of the recovery. In *Harrison v. Southcote*, 1 Atk. p. 539: 2 Ves. p. 395, Lord Hardwicke considered that the heir-at-law was entitled to inquire by what means and under what deed he was disinherited (and apparently also to see the deed): and further, *ibid.* p. 539: p. 396, that he was entitled to an inspection of all deeds and writings relating to the estate by way of relief before he had established his title to see whether he was disinherited and by what means: or what estates were affected: *Leman v. Alie*, 1 Ambl. 163. In *Anon.* 2 Ch. Ca. 4, it was said that the issue would never be helped against a purchaser, but that there, the defendant being only devisee and therefore taking by bounty, the heir in tail should be aided. These cases in Peere Williams however were never followed. They were referred to by Lord Loughborough in *Shaftesbury v. Arrowsmith*, 4 Ves. p. 70, and by Lord Eldon in *Hylton v. Morgan*, 6 Ves. p. 296, and in *Princess of Wales v. Liverpool*, 1 Sw. p. 121, as under the circumstances not leading to any mischievous consequences, as being intended to prevent unnecessary proceedings at law by the heir, or perhaps as being justified on the ground that the reference to the deed made them part of the answer on the principles discussed *ante*, p. 255: and see Wigr. Pl. 349, 408—410: and Hare, pp. 191—193, where the propriety of these decisions is disputed: and *ante*, p. 274, as to the deed of recovery: and see *Baker v. Booker*, 6 Pri. 379, where the infant customary heir was refused discovery, referring to *Stapilton v. Do.* 1 Atk. 6: and *Gait v. Osbaldiston*, 1 Russ. 158. Mr. Hare, in Hare, p. 193, regards them rather as cases where production was ordered by way of equitable relief than by way of discovery, referring to *Harrison v. Southcote*, 2 Ves. p. 396.

An heir-at-law or in tail is entitled of course to see documents necessary or material to support his title in aid of an action of ejectment (see *post*, p. 523) or otherwise: *Jones v. Jones*, 3 Mer. p. 171—172: *Armitage v. Wadsworth*, 1 Mad. p. 192—193, referring to Redes. Pl. 130: *Hylton v. Morgan*, 6 Ves. p. 294: *Pulteney v. Warren*, *ibid.* p. 88: *Dormer v. Fortescue*, 2 Atk. p. 282: *Renison v. Ashley*, 3 Ves. p. 462: *Harrison v. Southcote*, 1 Atk. p. 539: *Crow v. Tyrrell*: though the adversary may also claim under them: see *Bennett v. Glossop*, 3 Ha. p. 580: to prove his heirship: *ibid.*: for instance documents or parts of documents relating to or showing his pedigree: *Rumbold v. Forteath*, 3 K. & J. p. 752: *Nolan v. Shannon*, 1 Moll. 169: *Hylton v. Morgan*, p. 296: *Wright v. Vernon*, 1 Dr. 344: and see *post*, p. 524, as to pedigrees and documents relating thereto: and therefore to have an affidavit of documents: *Rumbold v. Forteath*, 3 K. & J. 41: *Quin v. Ratliff*, 6 Jur. N. S. 1327: and see *post*, p. 518: so to have discovery in aid of a bill to remove outstanding terms: *Quin v. Ratliff*: *Shaftesbury v. Arrowsmith*, 4 Ves. p. 68: so where by reason of confusion of boundaries ejectment cannot be brought: see *Loker v. Rolle*, 3 Ves. 3: and see generally as to discovery in actions for recovery of land, *post*, Book III. Chap. III. Part III.

In *Hylton v. Morgan* and *Aston v. Exeter*, 6 Ves. 288, 293, Lord Eldon pointed out the distinction between a bill for discovery in aid of an ejectment action, and a bill praying also for relief (such as setting aside terms, p. 296,

or delivery of deeds, p. 290), in which case the court would not on motion make an order for production in an action not under its control but only on a decretal order: and see *Rumbold v. Forteath*, 3 K. & J. p. 751: *Dormer v. Fortescue*, 2 Atk. p. 282: 3 Atk. p. 124: *Pincke v. Thorneycroft*, 1 B. C. C. 289: *Hare*, p. 20—22: *Barney v. Luckett*: *Northey v. Pearce*, 1 S. & S. 419, 420: *Marsh v. Sibbald*, 2 V. & B. 375: and *post*, p. 611, in reference to bills of discovery.

A devisee was entitled against the heir-at-law to such discovery and production of deeds as might be necessary to try the validity of the will: *Hare*, p. 190: *Coop. Eq. Pl.* pp. 59, 197—198: of the will itself where alleged to be suppressed: *Barker v. Ray*, 5 Mad. 64. Persons who claim lands by a will or other voluntary disposition having the law on their side are entitled as against an heir-at-law to the assistance of a court of equity for a discovery of the deeds and writings relating to the devised estate, and to have their delivery up as following the land . . . ; otherwise the heir might defend himself at law by getting the deeds, unless compellable to discover and produce them, by setting up prior incumbrances and by that means preventing the trying the validity of the will: *Newcastle v. Pelham*, 3 B. P. C. 464; *Fonbl. Eq.* p. 487—489.

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(b) *Independently of Discovery*, see *ante*, p. 272.

By a right of inspection existing independently of discovery is meant a right existing independently of that right of inspection which litigants have as against one another in virtue of the litigation in which they are engaged: it is in fact relief and not discovery: and an action seeking for such inspection is an action for relief and not discovery: see as to actions for discovery *post*, p. 609.

As between tenants in common, joint tenants, coparceners, that is to say persons admitting themselves to be such, the right of inspection and taking copies by one of title deeds and other documents relating to the entirety in the hands of the other is undoubted and will be enforced by the court if necessary, but it does not clearly appear whether it is general, or whether it must be for some specific purpose, as for instance a sale: *Lambert v. Rogers*, 2 Mer. 489, p. 490: *Edmunds v. Foley*, 30 Beav. 282, p. 283: *Thorpe v. Houldsworth*, L. R. 7 Eq. p. 147: *Elton v. Elton*, 6 Jur. N. S. 136: *Shore v. Collett*, G. Coop. 234, p. 237 (counterpart of lease in order to proceed against a tenant): and see *post*, p. 277, as to remaindermen.

Where however a tenant in common mortgages his share to the other tenant in common and deposits the deeds with

him he loses his right of inspection: *Edmunds v. Foley*: that is to say, he is in the position of a mortgagor, see *post*, p. 546.

Where the holder of the documents had sold his share to a third person and only retained them by virtue of a mortgage made to him by the vendee, it was held that production could not be ordered in the latter's absence: *Lambert v. Rogers*: and see *ante*, p. 272: and see this case compared with *Chichester v. Donegal*, *post*, p. 278.

Qu. as to documents relating only to the share of the holder of them.

In *A. G. v. Lambe*, 3 Y. & C. 162, the crown as tenant in common of a manor was held entitled in a suit in which certain manorial rights were in dispute to see the conveyance to the defendant of the interest of the other tenant in common in some of the manorial rights: see this case further cited, *post*, p. 510.

Where a bill was filed insisting on a partition made between the plaintiff and defendant, who were tenants in common, or in the alternative for partition under the court, and the defendant alleged that the partition was invalid, the plaintiff was held entitled to the production of deeds and other documents relating exclusively to the defendant's share and showing how she had dealt with it since the partition, for he had an interest in them if only for the purpose of ascertaining who were tenants in common with him: *Maden v. Vevers*, 7 Beav. 489. But qu. as to actual production being necessary for this purpose, see *ante*, p. 23.

In *Potter v. Waller*, 2 D. G. & Sm. 410, a suit by the owners of one moiety and claiming to be owners of the other moiety against persons claiming to have purchased this second moiety for declaration of the rights of the parties and partition, the plaintiffs were held entitled to have an answer as to certain representations which they alleged the defendants to have made about their title to the moiety, but not as to their truth, nor need they answer as to their title, but they must give a list of documents.

Any person entitled to a vested remainder in an estate may maintain a bill against the tenant for life for the sole purpose of production and inspection of the title deeds and writings relating to the estate in order to enable the remainderman to deal with his property as he may consider most for his advantage: Lord Romilly in *Davis v. Dysart*, 20 Beav. 405, p. 414, (and see *Pennell v. Dysart*, 27 Beav. 542, p. 548): and so any person standing in his place as a mortgagee: *ibid.*: though not in the mortgagor's absence where the mortgage is open to question: *ibid.* pp. 421, 422. His title must be clear and undisputed; that is to say it must not be such as to be capable of reasonable dispute: *ibid.* p. 417: *Pennell v. Dysart*, p. 550. It will only be granted

for a proper purpose such as for the purpose of litigation or where he desires to mortgage his interest: *Lempster v. Pomfret*, 1 Ambl. p. 154: *Davis v. Dysart*, p. 423: *Shaw v. Shaw*, 12 Pri. 165: but Lord Romilly considered that the onus was on the party resisting production to show that it was required for an improper purpose: *Davis v. Dysart*, p. 415. Qu. whether as said in *Shaw v. Shaw*, p. 167, there is no right to general inspection but only of inspection of particular deeds for a precise object.

It was said by Sir Thomas Plumer in *Noel v. Ward*, 1 Madd. 322, that there was no case in which a person having only a contingent remainder was allowed inspection: and in this case inspection was refused to the purchaser of a contingent interest.

In *Chichester v. Donegal*, L. R. 4 Ch. 417, a person interested under a settlement brought an action against the tenant for life for discovery, by way of relief, of the property subject to the settlement and for production of the settlement: interrogatories asking as to the contents of the settlement, the particulars of the property, and for a list of documents were administered: the defendant admitting the plaintiff's interest and having put in a partial answer was ordered to give a full answer, the discovery being necessary for the purposes of the suit, though it was practically identical with the relief (as to which see *ante*, p. 22). It appearing that the settlement was in the possession of a mortgagee under a mortgage made under a paramount power in the settlement, the latter was added as a party: the Court of Appeal (L. R. 5 Ch. 497), reversing James, V. C., refused to allow inspection of a document held by a mortgagee (see *post*, p. 273, as to a mortgagee in connection with this case. See also *Bugden v. South*, referred to *ante*, p. 273: and *ante*, p. 272).

So the heir-at-law of a married woman might maintain a bill for discovery of title deeds against the husband who was in as tenant by curtesy, for he was a trustee of them for the person entitled to the inheritance: *Amies v. Dampier*, cited in Coop. Eq. Pl. 59.



Except in the particular instances considered above there does not seem to be any general right to inspection in persons claiming under a common title unless there is some covenant for production which they are able to enforce. See however Copinger on Title Deeds, p. 50, referring to the Third Report of the Real Property Commissioners, *Barclay v. Raine*, 1 S. & S. 449 : and *Fain v. Akers*, 2 *ibid.* 533. In *Brigstocke v. Mansel*, 3 Madd. 47 : *Bunbury v. Briscoe*, 2 Ch. Ca. 42 : there would seem to be a disposition to extend the right to the owner of any estate claiming under a common instrument of title : and see Copinger, pp. 54, 55 : and *Renison v. Ashley*, 2 Ves. jun. p. 462.

See also a case of *Hercy v. Ferrers*, 4 Beav. 97 (cited *post*, p. 510), where a plaintiff entitled to a legacy charged on estates not in settlement was held entitled to see the deed creating the entail under which the testator was tenant in tail, in order to see what estates were settled and what not, as against the testator's grandson the then tenant in tail.

## II. Other Instances in which this kind of Interest exists to a greater or less Extent.

### Landlord and tenant.

It is the duty of a tenant to keep the boundaries on behalf of his lessor : *Aston v. Exeter*, 6 Ves. p. 292 : *Brown v. Wales*, L. R. 15 Eq. p. 147 : *A. G. v. Fullerton*, 2 V. & B. 263 : *A. G. v. Stephens*, 6 D. G. M. & G. 111 : *Smith v. Northumberland*, 1 Cox, 363, p. 365. Where a tenant of land for life or years or at will has land of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct so that at the expiration of the tenancy the reversioner or remainderman may be able without difficulty to resume possession of what belongs to him : *A. G. v. Stephens*, pp. 133—134.

The lessor therefore is entitled to inspect documents in the tenant's possession for this purpose : for instance of receipts for rent and maps : *Smith v. Northumberland*, bill by a rector against a person in possession of glebe lands : and see *Potts v. Adair*, 3 Sw. 268, apparently a similar case : any evidence in the tenant's possession which may elucidate the matter, even the title deeds of his own property however inconvenient and prejudicial, if there is no other way of proving the boundaries : *Southwell v. Thomson*, 6 L. J. Ch. 196, p. 197, where the tenant's title deeds were protected on the ground that no such necessity was shown. See also *Brown v. Wales*, L. R. 15 Eq. 142, a bill of discovery by a reversioner against tenants under expired leases alleging confusion of boundaries and that the defendants were in possession of parcels comprised in the leases.



And generally a lessor, or person claiming under him, may have a right to inspect documents of the tenant relating to the property, for instance books relating to tithes: *Inman v. Hodgson*, 1 Y. & J. 28, p. 30: or documents relating to the working of mines in the case of a lease of mines: *Taylor v. Rundell*, Cr. & Ph. p. 112: so counsel's opinion taken by the tenant under some circumstances: *A. G. v. Berkeley*, 2 J. & W. 291: and see *post*, p. 382.

See as to tenants of a manor *post*, Section III. (b).

A rector claiming under patrons by privity of title may have an interest of this kind: see *Bates v. Christ's College*, 26 L. J. Ch. 448.

A counsel has been held bound to produce drafts retained by him as precedents to any party concerned who might have any benefit from inspecting them: *Stanhope v. Roberts*, 2 Atk. 213.

Partners are in this sense interested in partnership documents: see for instance *Pickering v. Rigby* cited *ante*, p. 247; counsel's opinions: see *post*, p. 382; and see a peculiar case of *Pickering v. Pickering*, cited *ante*, p. 236.

So cestui que trusts in deeds and other documents relating to the trust: *Swaby v. Hutton*, 1 H. & M. 516: *Pickering v. Pickering*: and see *Whitham v. Whitham*, *ante*, p. 60: for instance account books: *Farrer v. Hutchinson*, 3 Y. & C. p. 700: cases and opinions stated and taken by the trustees: see *post*, p. 379. But though as between cestui que trusts and trustees or persons in the situation of trustees the production of deeds is a matter of course, if the cestui que trust mortgages the property to the trustee, the latter acquires the ordinary rights of a mortgagee (see *post*, p. 546), and may withhold the deeds from the cestui que trust's inspection: *Johnson v. Tucker*, 11 Jur. 382.

So residuary legatees as against the personal representative: *Greenwood v. Do.* 6 W. R. 119.

See other instances, *post*, p. 381, in connection with the subject of professional privilege.

Claimants to a lunatic's estate. Claimants to the estate of an intestate administered by the crown.

The court requires *prima facie* evidence of an applicant's title to the property of a deceased lunatic before he will be allowed to inspect documents in the possession of the master or registrar, for they ought not to be open to the inspection of strangers who have no shadow of interest in them: see *Re*

*Smyth*, 15 Ch. D. p. 286 and 16 Ch. D. p. 674 : (but see *Banner v. England*, 9 L. T. 697, where plaintiffs claiming as next of kin against persons who had been certified to be next of kin were allowed to inspect documents remaining in the custody of the master in lunacy apparently as a matter of course).

Where an action was brought between two rival claimants for real property of a deceased lunatic, the plaintiff claiming *ex parte maternâ*, the defendant *ex parte paternâ*, and the plaintiff applied by petition for inspection of affidavits deeds and documents relating to the lunatic's pedigree and real estate in the custody of the master or the registrar, Cotton, L. J. considered (referring to *Re Wood*, 4 D. G. J. & S. 134) that it was not the practice in lunacy to make such an order in favour of the applicant unless he showed a *prima facie* title to the property, and that his solicitor (he himself being abroad) must make a further affidavit verifying his title, an affidavit swearing that production was necessary for the establishment of his case not being sufficient. The defendant had been served but did not appear, and no order was made as to costs: 15 Ch. D. 286. Subsequently the defendant made a similar application supported by *prima facie* evidence of his title. An affidavit was filed on the plaintiff's behalf in opposition, to the effect that the property descended to the lunatic from his mother, and that the defendant was not related to her. But the application was granted, this being the issue in the cause, and the defendant had made out a *prima facie* case which made it reasonably probable that the documents might contain something to support his case: *ibid.* 16 Ch. D. 73.

It may be noted that where documents are in the custody of the court having jurisdiction in lunacy they are not in the possession or control of the lunatic's committee so as to justify an order against him for production: *Virian v. Little*, action for trespass cited, *ante*, p. 200.

In *Re Campbell*, 13 Ch. D. 323, next of kin petitioned for inspection of documents which had been deposited by the lunatic, before he was so found, with the National Safe Deposit Company: the court made an order that the official solicitor in lunacy should inspect and make a schedule of the documents.

In *Lane v. Gray*, L. R. 16 Eq. 552, a person claiming as next of kin of an intestate whose estate had been administered by the crown was held not entitled to have the common order for production on the solicitor to the treasury until she had made out a *prima facie* case.

### III. *Inspection of Documents of a Public Character.*

Inspection of certain documents of a public character, such for instance as corporation books (see *post*, sub-s. (c)) ; or court rolls (see *post*, sub-s. (b)) : *A. G. v. Coventry*, Bun. 290 ; or parochial books (see *post*, sub-s. (a)) ; could be obtained at common law (and see a summary motion for this purpose in chancery, *Anon.* 2 Ves. 578) by any person interested therein subject to certain restrictions.

In a note to *R. v. Newcastle*, 2 Str. 1223, documents of this character are classed with documents falling within the principles of the common law equitable jurisdiction discussed *ante*, p. 264, as instruments which are the common evidence

of several persons placed in the hands of one custodee for the benefit of all those who have this interest in them as being the evidence of their rights: and see *ante*, p. 271.

This practice at common law was altogether outside the province or functions of discovery. It was founded upon the right or claim (in the nature of ownership, see 2 Str. 1222) of the party to see the document by virtue of his interest as a member of the corporation, or a tenant of the manor, or inhabitant of the parish. Where therefore the party had no such interest but was a mere stranger, as for instance the lord of another manor, he had no such right of access: see Phill. Ev. II. 169: *Talbot v. Villeboys*, 3 T. R. p. 142: *R. v. Shelley*, 3 T. R. 141: and he must seek inspection in a court of equity under the form of discovery for the purpose of some pending or intended proceeding: see *Anon.* 2 Ves. 621. The documents were, quâ strangers, private documents: see *R. v. Buckingham*, 8 B. & C. p. 380: Tayl. Evid. § 1345: and *post*, p. 284.

In accordance with the invariable rule which protects a person from furnishing evidence that may expose him to a criminal charge (see *post*, p. 313), the party holding the documents would not be ordered to allow inspection of them where it was sought for the purpose of supporting a prosecution against himself: see Tayl. Ev. § 1351: or it is conceived if the inspection would disclose evidence of a criminal nature against himself whatever may have been the purpose for which it was sought: see Phill. Ev. II. 175: *R. v. Purnell*, 1 Wils. 239: *R. v. Bucks*, 8 B. & C. 375: *R. v. Shelley*, 3 T. R. 142: *R. v. Cornelius*, 2 Str. 1210: *R. v. Cadogan*, 1 D. & R. 550: 5 B. & A. 902: *R. v. Mead*, 2 Ld. Ray. 927: *R. v. Worsenham*, 1 Ld. Ray. 705: note to *R. v. Newcastle*, 2 Str. 1223: and generally it seems only in aid of civil proceedings: see *R. v. Holland*, 4 T. R. p. 694.

Points common to this common law practice in the case of all the above mentioned classes of documents.

If the person who had the custody of the documents and from whom the inspection was sought was a party to an action for the purpose of which the inspection was sought, application should have been made for a rule to

inspect. If he was not a party, or if inspection was not sought for the purpose of an action, application must have been made for a mandamus.

The rule was always nisi in the first instance except in the case of an application for limited inspection by a copyhold tenant of court rolls under rule 31, H. T. 1853, see *post*, p. 285: and in some cases where an inhabitant applied for inspection of parish documents: see *Anon.* 2 Chitt. 290.

Before coming to the court application must always have been previously made to the person from whom the inspection was sought: *Roe v. Aylmer, Barnes*, 236: and in the case of the tenant of a manor at all events not merely by a person employed by the applicant's agent on a written authority for that purpose: see *Ex parte Hutt*, 7 Dowl. 690: and in the case of a corporation to the proper quarter: see *post*, p. 291.

The granting of a mandamus was discretionary: see *post*, p. 291.

An affidavit must have accompanied the application stating the circumstances under which the inspection was claimed and stating further that an application had been made in the proper quarter for permission to make the required inspection which had been refused: *Phill. Evid.* II. 177: *Taylor, Evid.* 1265: *Roe v. Aylmer, Barnes*, 236, and *post*, p. 291: (as to refusal see *R. v. Wilts and Berks, &c. Co.* *post*, p. 291: *R. v. Bristol, &c. Co.* 4 Q. B. 162: *B. v. Brecknock, &c. Co.* 3 A. & E. pp. 222—223: *Birmingham, &c. Co. v. White*, 1 Q. B. 282, p. 286): and if not in an action the right under which it was claimed and the reason: *Phill. Evid.* II. 178.

(a) *The Inhabitants of a Parish County or Rating District and the Parish County or Rating Documents.*

The inhabitants of a parish: *R. v. Buckingham*, 8 B. & C. p. 380: have a right to inspect the parish books for parochial purposes: for instance in questions concerning rates: *Anon.* 2 Chitt. 290: *Newall v. Simpkin*, 6 Bing. 565: and see *A. G. v. Berry*, 2 Coll. 33. Not where the party's parochial right is not in question: *Cox v. Copping*, 5 Mad. 396: 1 Lord Ray. 337: not for instance for the purpose of supporting his claim to an estate: *R. v. Smallpiece*, 2 Chitt. 288: and see *May v. Gwynne*, 4 B. & Ald. 301, action for libel. Not where his own case was based on the footing of his not being a parishioner: *Burrell v. Nicholson*, 3 B. & A. 649: but in this case inspection was subsequently granted in chancery, see *post*, p. 509.

As to inspection by inhabitants of records of a court leet, see *R. v. Maidstone*, 6 D. & R. 334.

As to disputes between a parish and a county, see *R. v. Bucks*, 8 B. & C. 375.

As to the right of county ratepayers to inspect county accounts and papers, see *R. v. Staffordshire*, 6 A. & E. 84: *R. v. Nottingham*, 3 A. & E. 500.

As to inspection of churchwardens' accounts under 17

Geo. 2, c. 38, see *R. v. Clear*, 4 B. & C. 899 : *R. v. Great Faringdon*, 9 B. & C. 541 : *Edwards v. Bennett*, 6 Bing. 231.

As to inspection of rating and other books of commissioners of sewers, see *R. v. Commissioners of Sewers, &c.* 3 Q. B. 670.

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(b) *The Tenants of a Manor and Manor Documents.*

An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection and that the same has been refused : (see the old rule *post* from which this is taken) : Ord. XXXI. r. 19.

The right of the tenant of a manor to see the court rolls or other manor documents has been recognized from a very early period both in equity and at common law. Where the dispute about the customs of a manor, &c. is between the lord and a stranger who contests any of the customs of the manor there the lord should not be obliged to let him have inspection of the rolls because it is his private evidence : (see also *Owen v. Wynne* referred to *post*, p. 286 : and *Bishop of Hereford v. Bridgewater*, Bun. 269, bill for tithes) : but if the dispute is between two copyholders or between the copyholder and the lord, he should produce the rolls and permit copies to be taken thereof : *A. G. v. Coventry*, Bun. 290. The lord has the custody as a trustee of the title deeds and documents which show the rights of each particular tenant instead of their being allowed the custody of their own muniments : every one therefore has a claim on any dispute with the lord or question otherwise arising with regard to his own estate to resort to the court rolls for the purpose of seeing how the admissions have gone on former occasions on the particular estate, what are the customs of the manor affecting it, and whether he enjoys the privileges properly belonging to it : it is convenient that the evidence of title should be kept in one place, but it would be unreasonable if the tenants had not recourse to them : Littledale, J. in *R. v. Merchant Tailors*

*Co.* 2 B. & Ad. p. 128: and see *R. v. Shelley*, 3 T. R. p. 142: *Mayor of Southampton v. Graves*, 4 B. & A. p. 592: *Anon.* 2 Ves. 578, 621: *Combe v. City of London*, 4 Y. & C. p. 151.

The tenant however had no right to a general inspection of all the court rolls and all the titles, but only of such parts as related to his own title privileges or interest, and then only for some specific object: there must be some specific controversy (qu. whether a suit, see *post*) between the tenant and the lord or between one tenant and another (or with a stranger, see the passage quoted *ante* from the judgment of Littledale, J.) respecting his rights as such tenant, and inspection would be limited to that object: *R. v. Merchant Tailors Co.* 2 B. & A. pp. 125, 128—129: and *ante*, p. 284: *R. v. Tower*, 4 M. & S. 162: *Rogers v. Jones*, 4 D. & R. 484: *R. v. Lucas*, 10 East, 235: *Hobson v. Parker*, Barnes, 237: *Roe v. Aylmer*, Barnes, 236: *A. G. v. Coventry*, Bun. 290.

As to whether some suit must be pending.

In the case of a copyhold tenant it was not necessary (except where the rule was made absolute in the first instance under the rule *post*: see *Ex parte Best*, 3 Dowl. 38) that there should be a suit actually pending: *Ex parte Barnes*, 2 Dowl. N. S. 20: *R. v. Lucas*: *R. v. Tower*; Lord Ellenborough in the last case points out the hardship upon the tenant if he were obliged to commence his action as it were blindfold without knowing what his rights were. And the language in which he lays down the principle is sufficiently wide to cover a freehold tenant: and see *R. v. Merchant Tailors Co.* pp. 125—128. In an earlier case however, *R. v. Allgood*, 7 T. R. 746, an application by a freehold tenant was refused on the ground that no action was pending, but no express distinction between his case and that of the copyhold tenant was taken. And see *Tayl. Ev.* p. 1259, where it is said to be doubtful.

As to any distinction between a freehold and copyhold tenant.

The right of a freehold tenant to inspection at common law seems in two respects to have fallen short of that of a copyhold tenant; (1) as to the necessity of there being a pending action for the purpose of which inspection was required, see *ante*; (2) the right of the latter to a rule absolute in the first instance for limited inspection under rule 31, Hil. Term, 1853,\* continuing the old rule, H. T. 2 Wm. 4, s. 102, and the old practice: see *Ex parte Hutt*, 7 Dowl. 690: *Ex parte Barnes*, 2 Dowl. N. S. 20, and see now the new rule, *ante*. And in an early case the right of a freehold tenant would

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\* An order upon the lord of a manor to allow the usual limited inspection of the court rolls on the application of a copyhold tenant may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection.

seem to have been altogether disregarded: *Smith v. Davies*, 1 Wils. 104. However in subsequent cases it was recognised as unquestionable: see *Hobson v. Parker*, *Baldwyn v. Tudge*, Barn. 236, 237: *Rogers v. Jones*, 5 D. & R. 484: *R. v. Allgood*, 7 T. R. 746: *Addington v. Clode*, 2 Will. Black. 1029: *Warrick v. Queen's Coll.* cited *post*: and Ph. Evid. II. p. 168: and Tayl. Ev. pp. 1258—1259.

Any person claiming an interest under the tenant apparently might inspect: *R. v. Tower*, 4 M. & S. 162: *Talbot v. Villeboys*, cited 3 T. R. 142. In *R. v. Lucas*, 10 East, 235, a person stating a *primâ facie* claim under a copyhold tenant was entitled to inspect for the purpose of seeing whether there was any conveyance by the tenant, for if there was no such conveyance, he was clearly entitled to the copyhold. Any party interested: *Ex parte Hutt*, 7 Dowl. 690: for instance a devisee of a rent charge on a copyhold, in order to deduce his title: *Ex parte Barnes*, 2 Dowl. N. S. 20. The party must either swear positively that he was entitled or set out his title for the court to see it: *Ex parte Cooke*, 5 D. & L. 413. See as to where the lord denies the tenant's title: *Warrick v. Queen's Coll.* and *Minet v. Morgan*, *post*.

In *Anon.* 2 Ves. sen. 578, Lord Hardwicke said he would make an order for production of court rolls on any person in whose hands they were.

The party might take copies as well as inspect: see *R. v. Lucas*, 10 East, 235: *A. G. v. Coventry*, Bun. 290.

Inspection in cases of enfranchisement was provided for by 15 & 16 Vict. c. 51, ss. 20, 21.

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In recent cases in equity the right (as a question of discovery) of the tenants of the manor to see court rolls and other manor documents where the extent of their rights as tenants are in dispute has been recognized: see *Owen v. Wynne*, 9 Ch. D. p. 33: *Warrick v. Queen's Coll.* L. R. 3 Eq. 683: *Minet v. Morgan*, L. R. 11 Eq. 284: and see *Knight v. Waterford*, 2 Y. & C. p. 41.

In *Warrick v. Queen's College* the plaintiffs alleged themselves to be freehold tenants of a manor and, as such, entitled to certain customary rights: the defendant the lord of the manor denied by answer both the plaintiffs'



title as freeholders and the existence of the rights. Lord Romilly ordered production of all the court rolls, on the ground that if the plaintiffs were not tenants that defence should have been raised by plea, and that the lord of the manor could not avoid disclosing the court rolls or prevent any examination of them by asserting that they did not show the plaintiffs' title when their title was as tenants of the manor and the question was what their rights were.

Where plaintiffs claimed adversely to the manor and it was the defendant, the lord of the manor, who asserted that they were tenants of the manor, they were held by the Court of Appeal, reversing Bacon, V. C. to have no right to see the manorial title or documents, though the documents might show that they had certain customary rights: for it was by means of these documents that the lord would establish that they were tenants and so defeat their claim: *Owen v. Wynne*.

In *Minet v. Morgan*, pp. 286, 288, Lord Romilly drew a distinction between a claim to common appurtenant and a claim to common appendant by a tenant of the manor. The former not claiming as tenant of the manor, there being no privity therefore between him and the lord, must to get production of the lord's documents either show that the right he claims has been actually exercised for a long time, or that the documents would tend to establish his claim. Accordingly in this case where a plaintiff claimed common appurtenant over a heath and the lord denied the right, the plaintiff was held entitled for the purpose of seeing whether there were facts to show his right to look at, (1) the records of and documents relating to courts leet and courts baron of the manor, and (2) those relating to the taking of gravel and turf on the heath, though he swore as to (1) that they related solely to the manor and the titles to lands of the manor and the rights and duties of the tenants of whom the plaintiff did not claim to be one, and as to (2) that they were private documents belonging to him as owner of the heath to the production of which no one not holding a right of common over the heath was entitled; and also to have a further affidavit of ancient documents connected with the manor and relating to the heath and of deeds and evidences of title to the manor and heath and records of courts and maps of the manor: but on the defendant making an affidavit of documents said to relate to the manor but to relate to the matters in the suit only as being parts of his title to the manor, and not to relate to the plaintiff's property or his alleged right or to support it, &c. or to defeat the defendant's defence (see as to the ordinary form of protection *post*, pp. 487—494), the plaintiff was held not entitled to see them, neither of the conditions laid down above being satisfied.

Where an order for inspection was made in a suit in equity between the lord and the tenants the inspection could be made without paying the steward's fees as in an ordinary case: *Hoare v. Wilson*, L. R. 4 Eq. 1.

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(c) *Members of Corporations and the Corporation Documents.*

See as to shareholders in companies *post*, Section IV.

A member of a corporation was not entitled whenever he chose to examine generally and take copies of all the corporation documents: according to the later cases at all events he

was only entitled to inspection for the specific purpose of some matter (and then only of such documents as bore upon the question) in dispute between himself and the corporation or another member of the corporation, though an action need not have been actually pending: *R. v. Merchant Tailors Co.* 2 B. & Ad. pp. 124, 125, 128, 129: *Re Burton & Saddlers Co.* 31 L. J. Q. B. 62: *R. v. Babb*, 3 T. R. 579: *R. v. Beverley*, 8 Dowl. 140: Tayl. Evid. pp. 1259—1260: *R. v. Newcastle*, 2 Str. 1222—1224: *Anon.* 2 Ves. 620: *Mayor of Southampton v. Graves*, 8 T. R. 590, p. 592: (or it is conceived in a dispute with a stranger: see *R. v. Newcastle*, 2 Str. 1222: and *R. v. Merchant Tailors Co.* p. 128, commenting on it): touching his rights as a member, not for the purpose of sustaining his private claims: *Stevens v. Mayor of Berwick*, 4 Dowl. 277: and see *A. G. v. Corp. of Poole*, cited 3 Sw. 268, n. information by persons claiming to elect a curate.

In *Re Burton & Saddlers Co.* at p. 64 Crompton, J. says: "I take the result of the cases to be that a mandamus may go against a corporation at the instance of a member of the corporation to inspect and see whether he can raise a particular case in his favour by examining the books. It must in my view be a case with reference to some defined distinct dispute, as to which it appears that it might be to his advantage to see the minutes of the corporation." In this case the plaintiff was allowed to inspect minutes relating to past elections to an office for the purpose of making out his right to such office. In *R. v. Merchant Tailors Co.* the application was refused as not being within the principles above stated, inspection being sought of all the corporation documents upon allegations of general misconduct in management of the corporation affairs and also in particular matters not affecting the applicant. See also *Imperial Gas Co. v. Clarke*, and *Birmingham, &c. Co. v. White*, referred to *post*, p. 293.

In *R. v. Babb* the rule ordered inspection of the documents in whose custody soever they were.

A person affected by the bye laws of a corporation and living under their rule though not a member was allowed to inspect the bye laws in an action against him for breach thereof: *Harrison v. Williams*, 3 B. & C. 162.

A defendant to an action by a corporation for tolls had no right to inspect the corporation documents: he was a mere stranger and the claim against him was like a claim by any private person: *Mayor of Southampton v. Graves*, pp. 593—594, disapproving some earlier cases contra: *Harrison v. Williams*: *Hodges v. Atkis*, 3 Wils. 398: *R. v. Beverley*,

8 Dowl. 140: and see *Anon.* 2 Ves. 621, where Lord Hardwicke ordered discovery of the petty customs: and *Bolton v. Liverpool*, and other cases referred to *post*, pp. 495—496, where the right to inspection by way of discovery was tested in the same way as in an action between strangers: but in *City of London v. Thomson*, 3 Sw. 265, n. inspection was allowed in such a case apparently by analogy to the relation of landlord and tenant. In a common law case, *Bristol v. Visger*, 8 D. & R. 434, it was refused, though the defendant had become a member of the corporation since the commencement of the action.

See as to inspection of books of admission of freemen, &c. under 32 Geo. 3, c. 58, s. 4, *Davies v. Humphreys*, 3 M. & S. 223.

Stockholders are entitled to inspect and take copies of entries in the Bank of England books relating to the stock in which they are interested: *Foster v. Bank of England*, 8 Q. B. 689; and similarly holders of East India Company's Stock: *Geary v. Hopkins*, 2 Lord Ray. 851. In *Foster v. Bank of England*, an action for refusal to pay dividends on certain stock, the bank alleging that the stock had been transferred from the plaintiff's name, were ordered to allow him to inspect the entry of the alleged transfer.

As to inspection by a member of the college of physicians, see *R. v. West*, 1 Wils. 240: by a member of the university of archives, &c., *R. v. Purnell*, 1 Wils. 239: by a prebendary of chapter charters, *Young v. Lamb*, 1 Will. Black 37: and generally as to other instances, see note to *R. v. Newcastle*, 2 Str. 1222.

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#### (d) *Miscellaneous Public Documents.*

Post office books where the question in the cause concerns a transaction therein: *Crew v. Blackburn*, 1 Wils. 240: custom house books where the question was touching the subject matter in the book: *Benson v. Port*, *ibid.*: writ of habeas corpus and of the committitur indorsed in the possession of the marshal: *Fox v. Jones*, 7 B. & C. 732: bishop's

registry of presentation by person claiming right to present : *Finch v. Ely*, 8 B. & C. 112.

For inspection of other public documents such as official documents, records of courts of law, indictments, depositions, &c., see Phill. Evid. II. 159—168 : Tayl. Evid. 1245—1258.

For cases where inspection of public documents is provided by statutes, see Tayl. Evid. 1266—1278.

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IV. *Shareholders in Companies : (both as to Inspection and Discovery of Documents and as to Discovery generally) : the Powers and Duties of Liquidators.*

See *ante*, Sect. III. as to members of corporations.

(a) *Where the Company is not in Liquidation.*

By sections 117, 119 of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16, sects. 117, 119), provision is made for inspection of the books of account and other books of companies by the shareholders at reasonable times during prescribed periods : and in the private acts of many companies there are clauses of a similar nature.

It is not, however, the intention of these sections and clauses that a shareholder shall have an absolute right to inspect all the documents of the company whenever he chooses, and that they are to be always open to his inspection : he is only entitled to see them for some reasonable or proper object : *R. v. Grand Canal Co.* 1 Ir. L. R. 337 : (and see *R. v. Clear*, *ante*, p. 284, churchwardens' accounts) : *R. v. London and St. Katharine's Docks Co.* 44 L. J. Q. B. 4. But it was held not an improper object where a shareholder, who was acting as solicitor for another company which had been engaged in successful litigation with the company in question, sought inspection of the register of shareholders for the purpose of canvassing them in order to induce them to vote against appealing from the adverse decision in such litigation : *R. v. Wilts and Berks, &c. Co.* 29 L. T. 922.

There is no inflexible or universal rule that the shareholder must, on making application to the directors or other officials for inspection, state what his object is: *R. v. London and St. Katharine's Docks Co.*: *R. v. Wilts and Berks, &c. Co.*: certainly where he only seeks to inspect a single document, such for instance as the register of shareholders: *R. v. Wilts and Berks, &c. Canal Co.* But if his application is to see all the company's documents, it seems that he must state his object: see *R. v. Wilts and Berks, &c. Co.* p. 924: and *R. v. Grand Canal Co.* where the application was to inspect the minute books of all the half-yearly meetings, and where the applicant showed no reasonable object for his application either to the directors or to the court. And more particularly, where the documents contain particulars of transactions which it might be prejudicial or inconvenient to disclose; he must show that his object is a legitimate one and possesses for him an advantage proportionate to the disadvantage it may bring to the company: *R. v. London and St. Katharine's Docks Co.*: *R. v. Wilts and Berks, &c. Co.* 3 A. & E. 477. At any rate the court will not grant a mandamus in such cases unless he satisfy the court that his object is a reasonable one: *R. v. London and St. Katharine's Docks Co.*: *R. v. Wilts and Berks, &c. Co.* 3 A. & E. 477: *R. v. Grand Canal Co.*: see also *R. v. Clear*. But it seems that if he then show that he seeks inspection for a proper object, the court will grant a mandamus, though the directors or other officials may have been right in refusing his application for inspection, he having stated no object: see the cases above. He must however show that there has been a refusal in the proper quarter: *R. v. Wilts and Berks, &c. Co.* 3 A. & E. 477, where the applicant was informed that his application would be considered (and qu. whether he had applied to the proper persons) and this was held to be no refusal. The granting of a mandamus is discretionary: *R. v. London and St. Katharine's Docks Co.*: *R. v. Wilts & Berks, &c. Co.* 29 L. T. 922.

Under section 43 of the Companies Act, 1862, the register of mortgages is open to the inspection of any creditor or member of the company: and a member's solicitor may in-

spect on his behalf: *Re Credit Co.* 11 Ch. D. 256: and in that case an order was made for liberty for himself, his solicitor or agent to inspect (see further as to this case *post*).

Where by a special clause in the deed of settlement shareholders were entitled to inspect "the books wherein the proceedings of the company were recorded," these words were held not to include minute books of the directors' proceedings: *R. v. Mariquita, &c. Co.* 1 E. & E. 289; 28 L. J. Q. B. 67.

As to inspection by an execution creditor of a company under the act, see *Meader v. Isle of Wight Ferry Co.* 9 W. R. 750, and *Pontet v. Basingstoke Canal Co.* 2 Bing. N. S. 370.

A petition is a cause or matter, and therefore discovery may be obtained therein under the rules of Ord. XXXI. independently of any statutory or other right of inspection which a shareholder may have. Where a shareholder petitioned for a compulsory winding-up order and a director filed an affidavit in opposition, in which he gave certain figures which he said were taken from the company's books, the petitioner gave notice of inspection, under rule 15, of the books therein referred to, and it seems that if his notice had been in proper form (see *ante*, p. 243) an order would have been made: *Re Credit Co.* 11 Ch. D. 256. But a petitioner in a winding-up petition is not necessarily and in all cases entitled to inspection of the company's books: for instance where the court sees the petition is a speculative one, or a wrecker's petition: see *Re West Devon Great Consols Mine*, *post*.

An order for production before an examiner of a company's books for the purpose of the cross-examination of an officer on his affidavit in opposition to a winding-up petition is not by way of discovery: *Re Emma Silver Mining Co.* L. R. 10 Ch. 194.

In an action (at common law after the C. L. P. Acts) for calls, the company being in liquidation, the defendant having been allowed inspection of the registry and the allotment and agenda books, the Court of Appeal refused to interfere with the judge's discretion: *Lancashire, &c. Co. v. Greatorex*, 14

L. T. 290. In an earlier case before the C. L. P. Acts an order was refused, partly apparently on the ground that he had neglected to apply to the company for inspection as pointed out by the statute of the company, and partly on the ground that it was sought not for the purpose of assisting the defendant to plead a particular plea but in order to fish out a defence (as to which see further *ante*, p. 268): *Birmingham, &c. Co. v. White*, 1 Q. B. 283: and see *Imperial Gas Co. v. Clarke* referred to *ante*, p. 268.

See also *Metropolitan, &c. Co. v. Hawkins*, cited *post*, p. 513, an action for libel by a company against a shareholder.

See as to inspection by a shareholder in a cost book company under the Stannaries Act, 1855, s. 22 (enabling the vice-warden to make an order for inspection of the company's books on the application of any adventurer or shareholder in the mine, or creditor of the adventurers, though no suit is pending), *Re The West Devon Great Consols Mine*, 32 W. R. 890, where the Court of Appeal affirmed an order of the vice-warden giving inspection to a shareholder, petitioner in a winding-up petition, and adjourning the petition for this purpose, holding that the mere pendency of the petition did not take away the power to order inspection under that section, and that it was a case for the exercise of his discretion; and see *ante* further as to this case.

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(b) *Where the Company is in Liquidation.*

The right of a shareholder to inspect the company's books by virtue of the articles of association was held not to apply when the company was in voluntary liquidation: *Re Yorkshire Fibre Co.* L. R. 9 Eq. 651. But where a company was being wound up only for the purpose of re-construction, this being a winding up in name only, a shareholder in the re-constructed company was held bound by a clause in the articles restricting the right of inspection: *Re Metropolitan and Provincial Bank*, 16 W. R. 668.



By act of parliament provision is made for giving access to any person interested: *Re Contract Corporation, Gooch's case*, L. R. 7 Ch. 207, p. 210.

Section 156, Companies Act, 1862:—

Where an order has been made for winding up a company by the court or subject to the supervision of the court the court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the court but not further or otherwise.

The official liquidator is in the position of a receiver and manager of partnership assets. He must maintain an even and impartial hand between all the persons whose interests are involved in the winding up: he is an officer of the court: he is bound to see that everybody has a fair field and no favour. "If a person interested in any such case" (that is to say any person whose interests are involved in the winding up) "desires to see any books or papers, it is the duty of the liquidator to give him not only access to them, but to give him every assistance and facility in finding out which are the relevant books and papers he requires: and if the liquidator has already ascertained any books or papers bearing on the subject, he should frankly place this information at the service of the party. But this is a very different thing from the liquidator being obliged at the instance of every person interested in every question arising, to employ that time, which unfortunately is so costly to the contributories, in making that fresh and careful investigation of the papers and documents in his possession which would be requisite to enable him truthfully to make the ordinary affidavit which is required from a party or quasi-party called on to make discovery:" *Re Contract Corporation*, pp. 211—212, 213.

Contributories or any person interested will as a rule be allowed to inspect the documents of the company at their own expense: *Re Birmingham Banking Co.* 36 L. J. 150: *Re Joint Stock Discount Co.* *ibid.*: 15 W. R. 99: *London Bank of Scotland*, 15 W. R. 1103: in spite of a clause in the articles precluding a shareholder from inspection: *Re Birmingham Banking Co.*: (the clause ceases to apply in liquidation, see *Yorkshire Fibre Co.* *ante*, p. 293): the object of the 156th section (*ante*) being only to prevent vexatious inspection: *ibid.* The inspection must be at reasonable times and on reasonable notice; and the information must not be divulged, the order, if necessary, being so framed (see *ante*, p. 238): *ibid.* In *Re Joint Stock Discount Co.* a special order under

special circumstances was made for inspection by an accountant, see *ante*, p. 179.

Where one company had transferred its business to another company, and subsequently both companies went into liquidation, an order was made on the latter company to produce the books of the former company for the inspection of its liquidator at reasonable times in the judge's chambers: *National Financial Co.* 15 W. R. 499.

See also *Ex parte Walker*, 15 Jur. 853, where the court refused on the motion of a contributory to discharge an order for inspection of certain books in the hands of the official manager obtained by D. on behalf of creditors who had filed their claims.

But where there is a question between the liquidator as representing the company on the one hand and the contributory or other person on the other hand, the liquidator is in the same position and is under the same obligation to give discovery as if he were the opposite party in an action: *Re Contract Corporation*, *Gooch's case*, L. R. 7 Ch. 207: *Re Barned's Banking Co. Ex parte Contract Corp.* L. R. 2 Ch. 350: as if he were the officer called upon to give discovery on behalf of a litigant company: *ibid.* "Among the other duties of an official liquidator, it may fall to him to represent the company as a party litigant. The company can only sue or be sued through his agency, and where there is a suit, or where there is in the winding up a proceeding which is in substance though not in form a bill or action by or against the company, then, from the very necessity of the case, the adverse party has a right to deal with the official liquidator as the litigant, and to obtain from him the same measure of discovery in the same manner as he would from any other litigant. That is the principle of the case (*Re Barned's Banking Co.*), and that principle sufficiently indicates the limits of its application": *Re Contract Corporation*, p. 212.

When therefore the liquidator seeks to put a party on the A. list of contributories and the party disputes his liability, the liquidator is bound (but see *Re Mutual Society*, *post*) to make an affidavit of documents relating to the particular shares or to the matters in question whatever they may be: *Re Contract Corporation*: and to answer all relevant interrogatories: *Re Barned's Banking Co.*: for the question is between him on the one side and the company on the other side. But where he only seeks to put him on the B. list of past contributories, there the question is one with which the existing company have no concern, and the liquidator is not, as representing the company, a party or quasi-party either for discovery or otherwise to the dispute, and is only bound to see that everybody has a fair field and no favour: *Re Contract Corporation*, p. 213.

But although the obligation of the liquidator to give full discovery in such a case is the same as if he were a litigant party in an action, he will not as of course be ordered to make an affidavit of documents. He is an officer of the court, and if he will not do what is right, the court will compel him. The proper course for a hostile litigant who seeks inspection is to apply to the liquidator, and he is bound to show him all the documents on which he relies, and any other documents which the litigant desires to see; and if the liquidator refuses, the court will order production: or under special circumstances, as if there is reason for distrusting him or for supposing that he is trying to avoid production of some particular document: *Re Mutual Society*, 22 Ch. D. 714, pp. 720, 721, where the liquidator sought to make the directors liable for acts of misfeasance, and where the Court of Appeal refused to order the liquidator to make an affidavit of documents, the liquidator having offered inspection of all the documents.

See a curious case, *Madrid Bank v. Bayley*, cited *ante*, p. 77, where the liquidator (plaintiff) was unable to procure an affidavit of documents from the late directors on whom an order had been made at the defendant's instance.

The liquidator has a reciprocal right against the hostile litigant: *Alexandra Palace Co.* 16 Ch. D. 58, where leave was given him to interrogate the secretary of the association, claimants in the winding up, the secretary having already made an affidavit of documents.

In *Re National Funds Assurance Co.* 24 W. R. 774, the Court of Appeal held that they had jurisdiction under rule 14 (see *ante*, p. 153) to order an affidavit of documents for the purpose of an appeal from a summons to strike off a contributory in proceedings under the Companies Act, 1862, but under the circumstances the motion was directed to stand over till the hearing of the appeal to see whether fresh evidence should be admitted, the documents required to be in court so as to be produced if the court should direct: and see *post*, p. 604.

By section 115 the court is enabled after it has made an

order for winding up to summon before it any officer (including the liquidator) of the company, or any other person under conditions and for objects similar or analogous to those contained in clause 27 of the Bankruptcy Act (see *post*, p. 575), the production of any documents being without prejudice to any claim for lien (see as to production and lien, *ante*, p. 205). See Buckley for the practice under this section.

The object of this section is discovery not evidence, as of section 27 of the Bankruptcy Act (see *post*, p. 575), the object is to put the applicant on the track of inquiry: see *Re Ottoman Co.* 15 W. R. 1069.

Any person may be summoned under this section, though not a creditor merely because he is a creditor, unless it is shown that he may be able to give information: *Re Accidental and Marine Insurance Co.* L. R. 5 Eq. 22: *Massey v. Allen*, 9 Ch. D. p. 169.

The power conferred by this section is an inquisitorial power, and must not therefore be used for the purpose of vexation and oppression: *Re Metropolitan Bank Heiron's case*, 15 Ch. D. 139, where a voluntary liquidator was refused leave to examine a person whom he had already interrogated in an action.

Any relevant questions may be put: *Massey v. Allen*, 9 Ch. D. 164.

The ordinary grounds of protection are open to persons examined under this section, that is to say professional privilege, and exposure to criminal prosecution: *Re Silkstone and Dodsworth, &c. Co.* 19 Ch. D. p. 121: *Re London Gas Meter Co.* 20 W. R. 394: but see as to the examination of a bankrupt, *post*, p. 576.

## BOOK II.

### OBJECTIONS TO DISCOVERY.



#### INTRODUCTORY CHAPTER.

##### *I. Matters not constituting by themselves Objections to Discovery which is clearly material.*

THE following matters do not independently or by themselves constitute objections to discovery which is clearly material for the determination of an issue immediately and certainly about to come on for trial (sufficiently material or necessary at that stage of the action, see *ante*, p. 25, referring to Ord. XXXI. rr. 6 and 12, and the references there given), though they are elements which will be taken into consideration by the court where the discovery is not clearly so material: see *ante*, pp. 11—12, 28, 29, 31.

(A.) *Where the Party called upon to give the Discovery is injuriously affected.*

(a) *Expense, inconvenience, trouble (except perhaps where the Party seeking the Discovery could get it easily, effectually and cheaply aliunde, see post (b), or where he could get it by Inspection of the Opponent's Documents, see ante, pp. 91, 123, or by way of Admissions or Particulars, see ante, p. 91).*

Under rule 7 interrogatories may be struck out if prolix or oppressive, see *ante*, pp. 105, 106, and see *ante*, pp. 108, 121, as to unnecessarily wide interrogatories: but where the whole of an interrogatory is clearly material at that stage of the action it is conceived that it cannot be said to be prolix or oppressive (subject to the considerations in the heading

above) for the purpose of striking it out however much expense time and trouble the giving of it may involve. And so with respect to the provision for setting aside interrogatories exhibited unreasonably or vexatiously, see *ante*, pp. 101, 104:

It was said that the court would not enforce or would exercise a proper control over any attempt on a party's part to press for discovery which would be vexatious or oppressive: *Elmer v. Creasy*, L. R. 9 Ch. pp. 73—74: *Saull v. Browne*, *ibid.* p. 367: *G. W. C. Co. v. Tucker*, *ibid.* p. 376: *Reade v. Woodroffe*, 24 Beav. p. 425: and see *ante*, p. 31; but here again if the discovery was clearly material at that stage it was not in that sense vexatious or oppressive however much expense time and trouble the giving of it might involve.

Where the party has been unnecessarily put to expense in answering interrogatories, making affidavits of documents, or producing documents, he may be able to recover his costs under Ord. XXXI. r. 3, or Ord. LXV. r. 27 (20), see these rules *post*, Bk. III. Ch. VIII. and see *ante*, p. 116, as to interrogatories: see *Hill v. Hart-Davis*, *ante*, p. 229, in reference to a prolix affidavit of documents.

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- (b) (See *ante*, p. 298) *That the Party seeking the Discovery can get the required Information aliunde (except perhaps where giving the Discovery would involve Expense Inconvenience or Trouble, see ante (a)).*

Every plaintiff had a right to a discovery from his adversary of every fact of which he was cognisant whether the plaintiff could prove them aliunde or not: Sp. Eq. Jur. I. 677: and see *Hodsoll v. Taylor*, L. R. 9 Q. B. p. 83.

One reason is that the party may require the discovery in the form of an admission by the adversary, see *ante*, p. 2.

It was no objection to producing a pedigree obtained from the Herald's College that the party had obtained it at his own expense: *Wright v. Vernon*, 1 Dr. p. 351. So a copy of a public document: see *Bolton v. Corp. Liverpool*, 3 Sim. pp. 479—480: and *Lyell v. Kennedy*, *post*, p. 392.

The decision in *Bird v. Malzy*, 1 C. B. N. S. 308, refusing discovery of matters which the interrogating party might have obtained from his own agents, was disregarded in *Revo v. Hutchins*, 10 C. B. N. S. 829.

It was considered an additional reason for ordering discovery that it rested exclusively within the knowledge of the party from whom it was sought, as where the matters were transactions or communications with a deceased person: *Hill v. Wates*, L. R. 9 C. P. 688: *Hawkins v. Carr*, L. R. 1 Q. B. 89: and *post*, p. 457. It may sometimes happen that an executor or administrator may properly interrogate as to circumstances which lay within the knowledge of the deceased person whom he represents: Cotton, L. J. in *Eade v. Jacobs*, 3 Ex. D. p. 337. See also *Daniell v. Bond*, cited *ante*, p. 185, where underwriters (see as to underwriters *post*, Bk. III. Ch. II.) and other persons were held entitled to production of a ship's documents as being the only means of getting certain information: and see Lush, Pr. 855—856.

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(c) (See *ante*, p. 298) *That the Discovery will involve a Disclosure of the Party's private Means and Transactions, his Trade Secrets Private Business and dealings with other Persons, the Names of his Customers (see post (B.) (b), as to any Objection on the ground of its injuriously affecting the Customers or other Persons).*

In *G. W. C. Co. v. Tucker*: *Carver v. Pinto Leite*: *Moore v. Craven*: *Heugh v. Garrett*: *Dos Santos v. Frietas*: and other cases cited *ante*, pp. 30—33: (see also *Lingen v. Simpson*, 6 Madd. 290: and see also *Attwood v. Small* and other cases cited *ante*, pp. 113—114, where discovery of this kind was refused): the discovery was either altogether immaterial or only consequentially material; where it was clearly material for the determination of an immediate issue it would be allowed: see for instance *Newton v. Dimes*, cited *ante*, p. 114. In determining whether particular discovery is material or not the court will exercise a discretion in refusing to en-



force it where it is remote in its bearings on the real point in issue and would be an oppressive inquisition: Wigr. Pl. 228: and see *Janson v. Solarte*, 2 Y. & C. p. 137 (also cited *post*, Bk. III. Ch. II.), where the interrogatories were objectionable as being immaterial and inquisitive.

In *Don Francisco*, 31 L. J. Adm. 205, it was held to be no objection to the production of relevant letters from a partner that they disclosed the private secrets of the business.

See also *Carter v. Goetre*, cited *post*, p. 305: and *Murray v. Clayton*, cited *post*, Bk. III. Ch. I. Sect. II (a).

That a document is private is no objection to its production: *Newton v. Beresford*, Younge, p. 391.

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(d) (See *ante*, p. 298.) *That the Discovery will expose him to a civil Suit.*

See *post*, p. 335, referring to 46 Geo. III. cap. 37.

Otherwise if it will expose him to criminal or penal proceedings: see *post*, Chap. I.

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(e) (See *ante*, 298.) *That the Discovery will involve the Disclosure as against himself (see as against other Persons post, (B) (a)) of private and confidential Communications by him to other Persons or by other Persons to himself except as to Matters falling within the Doctrine of legal professional Privilege.*

See *Bolton v. Corp. Licerpool*, 1 M. & K. pp. 94—95: *Greenough v. Gaskell*, *ibid.* p. 101: *Greenlaw v. King*, 1 Beav. p. 145.

See as to confidential reports to insurance companies *post*, p. 304.

See as to a scrivener *post*, p. 306.

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(B.) (See *ante*, p. 298.) *Where other Persons whether Parties to the Action or not will be injuriously affected by the Disclosure.*

(a) (See *ante*, p. 298.) *That the Discovery will involve the Disclosure as against other Persons (see as against himself ante, A (e)) of private and confidential Communications by him to other Persons or by other Persons to himself except as to Matters falling within the Doctrine of legal professional Privilege.*

The distinction between a voluntary disclosure out of court and a compulsory disclosure under the sanction of the court is of the essence of discovery.

There is no privilege arising out of the closest confidential relationship except that of legal professional confidence: see *Wheeler v. Le Marchant*, 17 Ch. D. p. 681: *Greenlaw v. King*, 1 Beav. p. 145: *Southwark Water Co. v. Quick*, 3 Q. B. D. p. 321: *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 648: *Hill v. Elliott*, 5 C. & P. 430: *Bulman v. Young*, 31 W. R. 766.

It has been expressly held that there is no privilege to refuse discovery of communications made to or knowledge acquired by persons in the following positions:—

A friend: *Greenlaw v. King*: *Wilson v. Rastall*, 4 T. R. p. 758; even as to matters of the most delicate nature on which advice is sought with respect to a man's honour or reputation: *Wheeler v. Le Marchant*; a parent: *Greenlaw v. King*; a servant: *Vailliant v. Dodemead*, 2 Atk. p. 524; a steward: *Wilson v. Rastall*, p. 759; *Greenlaw v. King*: *Vailliant v. Dodemead*: see some doubtful observations in *Falmouth v. Moss*, 11 Pri. p. 466; a trustee: *Jones v. Manchester*, 1 Vent. 197: in Bull N. P. 284 a, it is said that a trustee shall not be a witness to betray the trust, citing *Holt v. Tyrrell*, referred to *post*, p. 304: and see also *Davies v. Waters*, referred to *post*, p. 305: but there is no authority to support such an exception to the general rule; a clerk: in *Lee v. Birrell*, 3 Campb. 337, a clerk to the income tax commissioners who had taken an oath of secrecy was held bound to produce a book, production under subpoena in a court of justice being an implied exception: qu. as to *Webb v. Smith*, 1 C. & P. 337, where it seems that an articulated clerk

would not have been permitted to give evidence against his employer if the matter had been a secret within his oath of secrecy; a medical man: *Wheeler v. Le Marchant: Greenlaw v. King: Duchess of Kingston's case*, 20 How. St. Tr. 572: (and see as to reports of medical men to insurance companies on the lives of the insured *Mahony v. National, &c. Fund* and *Lee v. Hammerton*, *post*, p. 304): regretted by Buller J. in *Wilson v. Rastall* and by Brougham, L. C. in *Greenough v. Gaskell*, 1 M. & K. p. 103, and considered in Best. Evid. p. 521 to be of questionable policy and harsh and at variance with the practice in France and the statute law in some of the U. S. A.; a clergyman: *Wheeler v. Le Marchant: Greenlaw v. King: Anon. Skinner*, 404; a priest even as to matters disclosed in confession: *Wheeler v. Le Marchant: Anderson v. Bank of British Columbia*, p. 650: see Best. Evid. pp. 522—526, where some doubt is expressed as to whether the law is so in regard to spiritual advisers of any creed and its policy is questioned: such communications are protected in France and by statute in some of the U. S. A.

In *Redes. Pl. 288*, an arbitrator is put on the same footing as a counsel or attorney in respect of his non-obligation to discover a fact knowledge of which has been derived from the confidence reposed in him in that capacity: and see *Beames, Pl. 271*, and *Cooper, Pl. 300*, citing this passage. But as observed in the note to *Story, Eq. Jur. § 1496*, in none of the cases cited by Lord Redesdale are arbitrators mentioned: nor in fact are arbitrators protected from disclosing facts stated before them but only the grounds of their awards, see *ante*, p. 52.

That communications are written by a person privately and confidentially to a party is no ground of privilege (if the documents are the sole and absolute property of the party, see *ante*, pp. 206—208), even though the person stipulates that they are to be considered as private and confidential and refuses to authorize their production: *M'Corquodale v. Bell*, 1 C. P. D. pp. 476, 479, 480 (discussed *post*, pp. 404, 414), where the plaintiff's solicitor requested the solicitor of a company not a party to the action to make certain investigations, and the latter agreed to do so on the stipulation that all communications from him to the plaintiff's solicitor were to be solely for the confidential use of the plaintiff and his legal advisers and were not to be communicated to any other person: and see *Tippin v. Coates*, 6 Ha. p. 21: and *Taylor v. Milner*, 11 Ves. p. 43: and see *ante*, p. 206, as to private and confidential letters. The person sending the document may intend to retain his property in it and even in any copy which he may authorize the party to make of it (see *Enthoven v. Cobb* explained on this ground *ante*, p. 207) in which case the document cannot be ordered to be produced on the ground of property, not confidence: see *ante*, p. 207.

In reference to the refusal of a defendant tenant for life to

disclose the contents of a settlement to the plaintiff who was interested thereunder Giffard, L. J. in *Chichester v. Donegal*, L. R. 4 Ch. p. 420, observed, that when the defendant said he was under a promise not to give the information that was a reason why he should be compelled to give it, for unquestionably a promise by a person having the custody of title deeds, not to tell a person entitled under them what the property was, showed that there was need for the courts to compel a discovery.

Where a defendant has by his acts subjected himself to give certain discovery, he cannot protect himself from answering by showing that to do so would be to commit a breach of faith with his other customers (see further *post*, p. 306, as to customers of a business): if he breaks faith with them he must be answerable to them for his conduct: *Flanagan v. Williams*, 2 Jones, 557, p. 572. In this suit which was brought for the purpose of recovering certain stock from the plaintiff's brokers, the defendants alleged that a gross amount of this stock, some of which belonged to the plaintiff and the remainder to their other customers, had been transferred to a new firm of brokers: the allegation being in this form, they were held bound to discover the respective quantities belonging to and the names of the other customers; and, as was said, in order that the plaintiff might be enabled to test the accuracy of the defendants' allegations.

There is a distinction between a disclosure in favour of a person within the compact of confidence and a disclosure in favour of a person not within it:—

Private and confidential reports made by medical officers of life insurance companies, or by private friends of the assured in reference to his life to the companies, are not privileged as against him: *Lee v. Hammerton*, 12 W. R. 975 (medical officer called as witness for the defence by the assured to show insanity); or the persons by whom the policy was effected: *Mahony v. National, &c. Fund*, L. R. 6 C. P. 252 (action on the policy against the company who pleaded misrepresentation—production by the company ordered); unless there is a contract on their part that the reports are to be private either with the company or with the officers or persons making them, in which case it might be otherwise: see *ibid.* pp. 257, 258: so they might be privileged as between the company and the persons making them: see *ibid.* p. 256.

An old case of *Holt v. Tyrrell*, cited in Bull. N. P. 284 as an authority for the proposition that a trustee shall not be a witness to betray the trust (as to which see *ante*, p. 302), may perhaps be explained on these grounds.

There a person was produced as witness to prove on what occasion a bond, the subject of the action, given by the defendant to the plaintiff, was given, and Holt, C. J. refused to admit him as he had been privately entrusted to make the bargain by both parties and to keep it secret. It seems that he was so entrusted by both parties and it was therefore a party to the compact who was seeking to have it divulged as against the other party: but see *post*.

Qu. however whether where there is a dispute between the parties to the compact the obligation of secrecy is not removed.

Where an action was brought to set aside an agreement for the sale of a secret process by the defendant to the plaintiff on the ground that he was possessed of no secret, the defendant was compelled to disclose what the secret process was, although there was a provision in the agreement by which the plaintiff undertook not to divulge the secret, for the plaintiff was not claiming under the agreement, but against it, and the only way to determine whether or not there was fraud was by investigating the process: *Carter v. Goetz*, 2 Keen, 581. In this case, p. 588, Lord Langdale said, "I apprehend he cannot procure another person to enter into engagements with him by alleging that he has a secret without at the same time subjecting himself in case of dispute to an inquiry whether there was a secret, although the inquiry cannot be conducted without leading to a disclosure of it."

See also the cases cited *post*, p. 308, as to contracting out of a right to inspection.

In further illustration of the general proposition reference may be made to the distinction between the production of a document in which some other person has a property, in which case no order for its production can be made in the absence of this person, and the disclosure of its nature or contents which, assuming the party to possess the knowledge or to have the means of acquiring it, cannot be resisted: see *ante*, pp. 135, 226. No such distinction between production of a document and disclosure of its contents seems to exist in the case of a witness at common law. In Taylor, Evid. p. 772, it is laid down as a general proposition, that whenever a party is justified in refusing to produce an instrument he cannot be forced to disclose its contents. The only authority which supports such a proposition are certain passages in *Davies v. Waters*, 9 M. & W. pp. 612, 613, where it is so laid down in reference to an attorney who was considered to hold a deed as trustee for his client. It is however to be observed that not only in this case but also in *R. v. Upper Bodington*, 8 D. & R. 726, also cited by the learned author, the witness

was an attorney and the deed was that of his client, which of course introduces entirely different considerations.

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(b) (See *ante*, p. 298) *That the Discovery will involve the Disclosure of the Accounts Private Affairs Dealings or Names of the Customers of a Trade or Business* (see *ante* A (c) *as to any objection on the ground of its injuriously affecting the Party himself*).

Although bankers would generally be protected from disclosing the accounts of or their dealings with their customers: see *Bridgewater v. De Winton*, 9 Jur. N. S. 1270 : *Telford v. Ruskin*, 1 Dr. & Sm. p. 150 ; yet if there were a question whether a particular bank by uniform custom had bound themselves by a particular mode of dealing with customers, then the mode in which they dealt with other customers would be proper to be disclosed: Romilly, M. R. in *Warrick v. Queen's Coll.* L. R. 3 Eq. 685 : and so in the case of insurance companies where their general custom is material: see *Girdlestone v. N. B. &c. Co.* L. R. 11 Eq. 197, cited *post*, p. 467. In *Lloyd v. Freshfield*, 2 C. & P. 325, a banker as witness was ordered to disclose the balance of a party to the action.

In old times a scrivener seems to have been protected from disclosing the names of persons who had entrusted him with money on the ground that he would be ruined in his trade, for no man would thereafter employ him : *Harvey v. Clayton*, 2 Sw. 221, n : *Anon. Skinner*, 404 : the former case was used as an authority in *Jones v. Pugh*, 1 Ph. 96, p. 103, where a solicitor was protected from disclosing the names of his clients whose money he had invested (see further as to this case *post*, p. 439) : the Lord Chancellor however seems to have considered it an ordinary part of a solicitor's duty to lay out money for his clients (see as to this *post*, p. 376) ; and further the discovery was really irrelevant, as in *Harvey v. Morris*, Finch, 214 : see *ante*, p. 113. Qu. whether the exception of

a scrivener could be sustained consistently with general principles: see also *ante*, A (e).

Where partners or their representatives are litigating between themselves over the partnership affairs no grounds of this kind can be put forward so as to interfere with the obligation to discover the partnership accounts and transactions, though the names of the debtors or customers of the firm will be thereby disclosed: *Telford v. Ruskin*, 1 Dr. & Sm. 148, p. 150: so an executor of a tradesman when called upon by the residuary legatees to set out an account of the assets and liabilities cannot refuse to do so on this ground: *ibid.* p. 150. Where the partnership is that of solicitors it seems that professional privilege cannot be asserted so as to defeat the obligation to give accounts or allow inspection: see *Brown v. Perkins*, 2 Ha. 540: *Reade v. Woodroffe*, 24 Beav. p. 425 (dispute between solicitors and their town agents): but the party is bound not to prejudice the interests of his clients: *ibid.*: where Lord Romilly considered that the defendant could give the required discovery so as to avoid that consequence: and see *post*, p. 428.

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- (c) *That the Discovery will expose other Persons to Actions:*  
*Tetley v. Easton and Murray v. Clayton*, cited *post*,  
*Bk. III. Ch. I. Sect. II. (a) (Infringement of Patent):*  
*even to Criminal or Penal Proceedings*, see *post*, p. 311.
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## II. *Miscellaneous Objections.*

See as to the objections which can be taken in respect of interrogatories under rules 6 and 7, *ante*, Bk. I. Ch. IV. Sects. III. and IV.: and an affidavit of documents under rule 12, *ante*, p. 155.

If it were shown that there was any improper motive in asking for discovery the court might hesitate to grant it: see *Hodsoll v. Taylor*, L. R. 9 Q. B. p. 83. But qu. whether as said in that case it is an improper motive that it is desired to



avoid subjecting an otherwise necessary witness to cross-examination.

Qu. as to discovery merely in order that the party may prepare himself for cross-examination: see *Ladds v. Walthew*, *post*, Bk. III. Ch. IV. Sect. I.

In *Waters v. Shaftesbury*, 12 Jur. N. S. p. 4, Stuart, V. C. considered that where criminal proceedings by the defendant were pending against the plaintiff in respect of the same matters, the machinery of the court should not be used to obtain from him production of a document the right to production of which was doubtful, and that it did concern the court what use might be made of the document in relation to those proceedings. But see *ante*, p. 238, as to imposing on the party an undertaking not to use documents for collateral purposes. In *Temperley v. Willett*, 25 L. J. Q. B. 259, inspection was refused where it was suspected that the real object was for the purpose of another action brought by the plaintiff against a third person. Under rule 6 an interrogatory may be objected to as being not *bonâ fide* for the purpose of the cause, see *ante*, pp. 100, 110.

Where the defendant's object appeared to be to gain time an order for an affidavit of documents on a plaintiff residing abroad was refused: *Anon.* 20 S. J. p. 102.

The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement: *Whiffen v. Hartwright*, 11 Beav. 111. But where a shareholder had executed the deed of settlement by which it was provided that no proprietor should be entitled to inspection of the company's books except at the half-yearly meetings he was held entitled to inspect them in proceedings between himself and the company: *Hall v. Connell*, 3 Y. & C. 707. And see *Re Birmingham Banking Co.* 15 L. T. 203, where, the company being in liquidation, a shareholder and contributory was held entitled to inspection in spite of the usual

secrecy clause, Lord Romilly considering that the object of the clause was only to prevent vexatious attempts to pry into them and that wherever a proper case for inspection was made out it should always be allowed: (see as to inspection in winding-up under sect. 156 of the Companies Act, *ante*, p. 294). See also *Carter v. Goetz*, cited *ante*, p. 305. In *Turney v. Bayley*, 4 D. G. J. & S. 332, an action for account of profits and payment of the share to which the plaintiff alleged himself to be entitled, he had bound himself by express stipulation not to examine or investigate the books. A motion for production was refused: but also on the ground that it was not material for any question that had to be decided at the hearing: on the hearing, 34 Beav. 106, an account was ordered, and an order made for production, the motion having been ordered to stand to the hearing.

It is no objection to production of a document that if made use of before a jury it might be injurious to the case of the party producing it: Jessel, M. R. in *Bustros v. White*, 1 Q. B. D. p. 427: and see *ante*, p. 185.

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### III. *The established Exceptions to or Limitations on the Right to Discovery.*

If the discovery is clearly material to the immediate issue it must\* be given (see in particular as to the court having no discretion to refuse production of relevant documents not falling within the established rules of protection, *ante*, pp. 152, 153), unless it falls within one of the established exceptions to or limitations on the right to discovery. These are five:—

1. A party is not compelled to give discovery which will expose him to the risk of any kind of punishment whether it

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\* Subject to the provisions of Ord. XXXI. rr. 6 and 7 relating to interrogatories and considered *ante*, Book I. Chap. IV. Sects. III. and IV. and of rule 12 as to affidavits of documents (*ante*, p. 155), and the other objections discussed *ante*, Sect. III.

be by way of pains or penalties or forfeiture: see *post*, Chap. I.

2. He is not compelled (or, if the professional adviser, allowed) to give discovery which will involve a disclosure of matters the subject of legal professional confidence: see *post*, Chap. II.

3. He is not compelled to give discovery of the evidence of his case: see *post*, Chap. III.

4. He is not compelled to give discovery where in conscience his own right is equal to that of his opponent: see *post*, Chap. IV.

5. He is not compelled (or allowed) to give discovery which would involve disclosures injurious to public interests: see *post*, Chap. V.

In Dan. Ch. Pr. 491, another objection to discovery is stated, namely that a third party has an interest therein and must not be prejudiced. This point has been discussed *ante*, pp. 298, 302—307, and it is there pointed out that this does not of itself constitute an independent objection to discovery though it is an element to be taken into consideration where the immediate materiality is doubtful. Where production of documents is sought and the interest is an interest of the nature of property, the question becomes a totally different one: see *ante*, pp. 194, 206.

## CHAPTER I.

DISCOVERY EXPOSING THE PARTY TO A CRIMINAL PROSECUTION,  
PENALTY OR FORFEITURE.

CRIMES punishments penalties forfeitures in respect of which discovery has been successfully or unsuccessfully resisted\* :—

Penalties, but not stipulated payments: see p. 336.

Not every loss of interest: see p. 334.

Breach of broker's oath—penalty of executor's bond: see p. 337—341.

Usury: *Cates v. Hardacre*, 3 Taunt. 424: *Suffolk v. Green*, 1 Atk. 450: *Whitmore v. Francis*, 8 Pri. 616: *Wildbore v. Parker*, Mos. 80, 124: *Sloman v. Kelly*, 4 Y. & C. 169: and see p. 334.

Gambling or keeping gaming-house, 8 & 9 Vict. c. 109: 9 Anne, c. 14: *Fisher v. Ronalds*, 12 C. B. 762: *Sidebottom v. Atkins*, 5 W. R. 743: 3 Jur. N. S. 631: *Lichfield v. Bond*, 6 Beav. 88: *Sloman v. Kelly*, 4 Y. & C. 169: *Fleming v. St. John*, 2 Sim. 181: *Orme v. Crockford*, 13 Pri. 376: *McClell*. 185: *Cowan v. Phillips*, 3 Anst. 843: *Wilkinson v. L'Eaugier*, 2 Y. & C. 366: and see p. 334.

Treble value of tithes: *Uxbridge v. Staveland*, 1 Ves. 55: *Anon.* 1 Vern. 60: and see p. 331.

Corrupt practices at elections: *R. v. Charlesworth*, 2 Fost. & Fin. 326: *Ex parte Symes*, 11 Ves. 251.

Penalties under Apothecaries Act: *Anon.* W. N. 75, p. 259: see p. 345.

Penalties under acts relating to qualification of brokers: see p. 338: and *Davis v. Reid*, 5 Sim. 443.

Penalties under stock-jobbing acts: *Short v. Mercier*, 2 D. G. & Sm. 649: 3 M. & G. 205: *Fisher v. Price*, 11 Beav. 194: *Bullock v. Richardson*, 11 Ves. 373: *Bancroft v. Wentworth*, 3 B. C. C. 11: *Billing v. Flight*, 1 Mad. 230: *Roberts v. Allatt*, 1 M. & M. 192: *Pritchett v. Smart*, 18 L. J. C. P. 211: 7 C. B. 625: *Robinson v. Lamond*, 15 Jur. 250: *Williams v. Trye*, 18 Beav. 366.

Penalties for infringing trade monopoly and other regulations of East India and other companies: *Williams v. Farington*, 3 B. C. C. 38: *E. I. Co. v. Campbell*, 1 Ves. 246: *Gascoigne v. Sidswell*, Gilb. 186: and see p. 337.

Penalties for evading customs or duties: see p. 335; for exporting wool: *Duncalfe v. Blake*, 1 Atk. 52.

Penalties for false return to Income Tax Commissioners: *Mitchell v. Koecker*, 11 Beav. 380: 12 Beav. 44: 18 L. J. Ch. 294.

Penalties under the stamp acts: *Whitaker v. Izod*, 2 Taunt. 114.

Penalties for misapplication of tolls (corporation): *Gibbons v. Waterloo Bridge Co.* 5 Pri. 491: see p. 343.

Penalties against persons other than Corporation of Trinity House for ballasting ships under 45 Geo. 3, c. 98: *Corp. Trinity House v. Burge*, 2 Sim. 401.

Military penalties: *Whittingham v. Burgoyne*, 3 Anst. 900.

Penal proceedings in a foreign country: see p. 344.

Slave trading: *Thorpe v. Macaulay*, 5 Mad. 218: see p. 349.

Foreign Enlistment Act: *The Mary*, 2 A. & E. 319.

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\* References are given to the pages in this chapter where material.

Act prohibiting commerce with Spain: 10 Geo. 2, c. 28: *Ewing v. Osbaldiston*, 6 Sim. 608.

Liability of solicitor to be struck off rolls and disqualified under 6 & 7 Vict. c. 73: *Scott v. Miller*, Johns. 220, 328: see p. 318; so as to a notary: *Nelme v. Newton*, 2 Y. & J. 186: and see *Bickford v. D'Arcy*, L. R. 1 Eq. 354.

Bribery: *Re Boyes*, 1 B. & S. 311: see p. 327.

Discovery of act of bankruptcy: *Chambers v. Thompson*, 4 B. C. C. 435: see p. 323.

Concealing bankrupt's goods: *Bracy's case*, 1 Ld. Raym. 99: and *Ex parte Nowlan*, post.

Illegal association: *Re Mexican, &c. Co.* 27 Beav. 474: 4 D. G. & J. 320: see p. 326.

Dealing in shares under 7 & 8 Vict. c. 110: *Re Mexican, &c. Co.*

Liability to a *quo warranto*: *A. G. v. Reynolds*, 1 Eq. Ca. Ab. 131: but see the cases cited ante, p. 3.

Forfeiture: as papist, see p. 332; as alien, see p. 332; on marriage without consent, see pp. 323, 336; on alienation, see p. 336; for disputing will, see p. 336; for committing waste: *Weaver v. Meath*, 2 Ves. 108: see p. 323: *A. G. v. Vincent*, Bunb. 192; of lease for breach of covenant, see p. 337; of seat in parliament: *Honeywood v. Selwyn*, 3 Atk. 275: see p. 323.

Simony: *Parkhurst v. Lowten*, 1 Mer. 391: 2 Sw. 194: *Gray v. Hesketh*, Ambl. 268: *A. G. v. Sudell*, Prec. in Ch. 214: *Bishop of London v. Fytche*, cited Redes. Pl. 193: *Southall v. —*, Y. 308: and see p. 321; even in favour of the patron, for the Crown might present a younger life: *ibid.* p. 317: *Parkhurst v. Lowten*, 1 Mer. pp. 401—402.

Plurality of livings: *Boteler v. Allington*, 3 Atk. 452.

Tenures in capite: see p. 336.

Forfeiture of outlaw's property: see p. 333.

Indictable fraud: *McCallum v. Turton*, 2 Y. & J. 186: see p. 324: *Re Mexican, &c. Co.* 27 Beav. 474: 4 De G. & J. 320; conspiracy: *Ex parte Reynolds*, 20 Ch. D. 294: see p. 327: *Lee v. Read*, 5 Beav. 381.

Not every indictable fraud or conspiracy: see p. 340: 13 Eliz. c. 5; 27 Eliz. c. 4: see p. 341: and see as to underwriters p. 340.

Prosecution for assault and false imprisonment: *Glyn v. Houston*, 1 Keen, 328: *Cogamaul v. Verelst*, *Nicol v. Do.* 4 B. P. C. 406, 416: and see p. 349.

Compounding a felony: *Claridge v. Hoare*, 14 Ves. 59: see p. 323: *Guiborn v. Fellows*, 2 Eq. Ca. Ab. 377.

Felony: *Cartwright v. Green*, 8 Ves. 408: see p. 345: *E. I. Co. v. Campbell*, 1 Ves. 246: *Ex parte Nowlan*, 11 Ves. 510 (bankrupt concealing his property: see post, Bk. III. Chap. V. Sect. II.): see p. 316.

Subornation of perjury: *Baker v. Pritchard*, 2 Atk. 387: see p. 323: *Selby v. Crew*, 2 Anst. 504.

Perjury in the suit: *Rice v. Gordon*, 13 Sim. 580: see p. 341.

Barratry: *Scott v. Miller*, Johns. 220, 328.

Maintenance: *Penrice v. Parker*, Finch, 75: *Sharpe v. Carter*, 3 P. W. 375: *Wallis v. Portland*, 3 Ves. jun. 494: *Bradlaugh v. Newdigate*, 11 Q. B. D. p. 7.

Champerty: Redes. Pl. 194.

Contracting for pretended titles: *Sharpe v. Carter*, 3 P. W. 375: see p. 325.

Forgery: *Lloyd v. Passingham*, 16 Ves. 58: *R. v. Garbett*, 2 C. & K. 474: *Chetwynd v. Marnell*, 1 B. & P. 271, application by defendant in common law action for inspection of bond on which the action was brought by officer of stamp duties on suspicion of forgery: see p. 268.

Embezzlement: *Waters v. Shaftesbury*, 12 Jur. N. S. 3: 14 W. R. 259.

Penalties under section 102 of the Larceny Act, action by common informer: *Anon.* W. N. 75, p. 219: see p. 345.

Indictment under 59 Geo. 3, c. 69 for fitting out vessels to be used by belligerent foreign countries: *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 334.

For not taking oaths on entering office of weigh-master under 4 Anne,

c. 14 : 10 Geo. 4, c. 7 : *M'Mahon v. Ellis and Others*, 10 Ir. C. L. R. 120 (action by weigh-master for disturbance in his office, defendant alleging as above).

Immorality or immoral consideration as involving an offence under the ecclesiastical laws : see p. 342 : not involving such an offence : *Benyon v. Nettlesfold*, 3 M. & G. 103.

Bigamy : *Hatfield v. Do.* 5 B. P. C. 102.

Penalties for acting as vestryman under Metropolis Management Act, 1855, section 54 : *Hunnings v. Williamson*, 10 Q. B. D. 459 : see p. 345.

Criminal prosecution : *Fisher v. Owen*, 8 Ch. D. 645 : see pp. 317, 318.

Actions for libel : cases under the C. L. P. Acts, p. 319 : *Atherley v. Harvey*, 2 Q. B. D. 524 : see pp. 317, 318 : *Allhusen v. Labouchere*, 3 Q. B. D. 654 : see pp. 317, 318 : *Webb v. East*, 5 Ex. D. 23, 108 : see pp. 314, 317 : *Lamb v. Munster*, 10 Q. B. D. 110 : see pp. 317, 328 : see also *Dalrymple v. Leslie*, 8 Q. B. D. 5, cited *ante*, p. 131 : *McLoughlin v. Dwyer*, 8 Ir. Rep. C. L. 170, where the libel was considered to be one not justifying the institution of criminal proceedings : see pp. 319, 347 : libel in newspapers under 6 & 7 Will. 4, c. 76 : 32 & 33 Vict. c. 24 : and 33 & 34 Vict. c. 99 : see p. 330.

Actions of tort : see p. 346.

Actions for penalties : see p. 345.

See also the various cases under the C. L. P. Acts, p. 319.

Special statutes compelling discovery : see p. 329.

A party is not compelled to give discovery which will expose him to the risk of any kind of punishment, whether it be by way of pains or penalties or forfeiture : see *ante*, p. 310.

*Nemo tenetur seipsum prodere* : see Hard. p. 139 : Parker, p. 159 : Story, Eq. Pl. 576 ; *King of Two Sicilies v. Willcox*, 1 Sim. N. S. p. 329 : or even "*accusare*:" see Best, Evid. pp. 122—123.

No one is bound to answer so as to subject himself to punishment in whatever manner that punishment may arise or whatever may be the nature of the punishment : Redes. Pl. 194, 284 : *Brownsward v. Edwards*, 2 Ves. p. 244 : whether by indictment information impeachment or by a bill of pains and penalties : *Glyn v. Houston*, 1 Keen, p. 337 : and see Lord Eldon in *Parkhurst v. Loucen*, 2 Sw. p. 214 : by common law statute or House of Commons : *Wildbore v. Parker*, Mos. 80, 124, p. 82 : (as to ecclesiastical offence see *post*, p. 342) : whether by way of criminal prosecution : *Chetwynd v. Linden*, 2 Ves. 450 : Redes. Pl. 194 : or by way of payment of a penalty or anything in the nature of a penalty : Lord Hardwicke in *Smith v. Read*, 1 Atk. p. 527, and in *Harrison v. Southcote*, 2 Ves. p. 393 : Redes. Pl. 194 : *E. I. Co. v. Campbell*, 1 Ves. p. 247 : loss by a penal law : Lord Hardwicke in *Harrison v. Southcote*, 2 Ves. p. 395 ; 1 Atk. p. 539 : or by way of forfeiture or something in the nature

of a forfeiture: *Redes*. Pl. 194, 197: *U. S. A. v. Macrae*, L. R. 3 Ch. 79: *Harrison v. Southcote*, 2 Ves. p. 395: *Boteler v. Allington*, 3 Atk. 452, p. 456: whether to be enforced in equity or at law: *Lucas v. Evans*, *post*, p. 332: whether a forfeiture of a thing vested or a disability to take inflicted as a penalty: Lord Hardwicke in *Smith v. Read*, p. 527: and whether in himself or a predecessor in title: *ibid.*: *Harrison v. Southcote*, 2 Ves. 389: 1 Atk. 527. And generally see an old case *A. G. v. Mico*, Hard. 137, 201, elaborately argued: and see *post*, Section V.

It is a well known rule applying both to the examination of witnesses (see *post*, p. 335, as to 46 Geo. 3 c. 37) and to interrogatories of defendants in equity, that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty or forfeiture: see Lord Chelmsford in *U. S. A. v. Macrae*, L. R. 3 Ch. p. 83. The rule is that the court will not oblige one to discover that which if he answers in the affirmative will subject him to the punishment of a crime, for it is not material that if he answer in the negative he will not so subject himself: *E. I. Co. v. Campbell*, 1 Ves. p. 247: and see *Mitchell v. Koecker*, 11 Beav. p. 382.

In *Webb v. East*, 5 Ex. D. 108, Jessel, M. R. pp. 109 and 112, and Cotton, L. J. p. 114, seemed to consider that there was some doubt whether a party could decline to produce a document on the ground that it would criminate or tend to criminate him. But there would seem to be ample authority in equity for the general proposition that the privilege (both as to criminatory and other penalising matter) obtains equally in regard to production of documents as to answers to interrogatories: *Parkhurst v. Lowten*, 1 Mer. 391: 2 Sw. pp. 212—213: *Nelme v. Newton*, 2 Y. & J. p. 187: *Waters v. Shaftesbury*, 14 W. R. 259: *Eving v. Osbaldiston*, 6 Sim. 609: *King of Two Sicilies v. Willcox*, 1 Sim. N. S. 301: *Mitchell v. Koecker*, 18 L. J. Ch. 295.\* And it is not impossible that an

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\* See *ante*, p. 169, referring to cases where documents deposited in court were ordered to be produced or detained for the purpose of criminal proceedings. So stated both as to a party and a witness in *Tayl. Evid.* § 1463: and



objection could be taken to making an affidavit of documents if it involved a disclosure of the possession and existence of a document of a criminatory or penalising character: see *Bunn v. Bunn*, *post*, p. 341.

Where the adversary is unable to obtain discovery of matters for these reasons he must make them out by his own evidence: see *Franco v. Bolton*, 3 Ves. p. 372: *Mitchell v. Koecker*, 18 L. J. Ch. 295: 12 Beav. 44.

The party's refusal to answer is not to be taken as a presumption or as evidence or as an admission of his guilt: see *Ex parte Symes*, 11 Ves. p. 523: *Lloyd v. Passingham*, 16 Ves. pp. 64, 69, where a criminal charge was demurred to (see however as to a demurrer Lord Hardwicke in *Honeywood v. Selwyn*, 3 Atk. p. 275: and *post*, p. 318): otherwise the privilege would be destroyed: see *Wentworth v. Lloyd*, 10 H. of L. Ca. p. 590.\* But though this is so in principle, in practice it is impossible that the party should not sometimes be prejudiced by his refusal to give the discovery: see *post*, p. 317: (and see *Ex parte Symes*, 11 Ves. 251, where the unavoidable effect of the party's refusal to answer was that he failed to discharge himself of the receipt of a sum of money traced to his hands): and in *Webb v. East*, 5 Ex. D. 108, an action for a libellous letter, as to which being privileged it was necessary to show malice, the defendant having objected to produce the letter, Jessel, M. R. said, p. 112, that in such a case a defendant could never be advised to make an affidavit that its production would tend to criminate him for it would be equivalent to confessing the action and consequently its production could not be withheld: (but see *Hill v. Campbell*, *post*, p. 320). It may however be pointed out that it is sufficient if the party swears that he believes the discovery would tend † to criminate himself: *Lamb v. Mun-*

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Best, Evid. p. 218: (see a special case *R. v. Leatham*, 8 Cox, 498, p. 501: 3 E. & E. 658). The party must of course pledge his oath to the best of his knowledge information and belief that the production would have that effect: see *Webb v. East*, pp. 112, 114: and *post*, p. 328.

\* In Tayl. Evid. § 1467 the soundness of this proposition as regards a witness and the credit to be given him is considered questionable.

† A tendency to criminate has been defined to mean a tendency to bring him into the peril and possibility of being convicted as a criminal: Field J.

*ster* : or to show his liability to a penalty : *Scott v. Miller*, Johns. p. 332 (as to the exact words see *post*, Section IV. : and generally further on this point, *post*, Section III. and as to a fact constituting a link in the chain of evidence, *post*, p. 321). He is not bound to say that he has committed the crime or is liable to the penalty, for such a condition would destroy the object of the rule : *Short v. Mercier*, 2 D. G. & Sm. p. 649 : *Scott v. Miller*, p. 332 ; or that he is guilty of the offence but is not going to furnish evidence against it, for the privilege would then be illusory : Stephen, J. in *Lamb v. Munster*, 10 Q. B. D. p. 113, and see *post*, pp. 326, 328.

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I. *As to the Stage at which Protection can be claimed.*

The privilege may be claimed at any stage : it makes no difference that the party has already answered in part : *Reg. v. Garbett*, 2 Car. & K. 474, referred to and approved in *King of Two Sicilies v. Willcox*, 1 Sim. N. S. p. 320, though what he has disclosed may be ample evidence to convict him : *ibid.* where a decision in *Ewing v. Osbaldiston*, 6 Sim. 608, ordering production of documents on the ground that the party having already made admissions showing his liability to penalties could not be damnified by such production, was disapproved. The court ought not to run the risk of putting the party in a worse situation : *Cooke v. Turner*, 14 Sim. p. 221.

In reference to the examination of a bankrupt (see as to a bankrupt Bk. III. Ch. V. Sect. II.) as to matters involving a felony Lord Eldon observed that if there was no right to ask the questions, there was no right to consider whether the answers were satisfactory or not : *Ex parte Nowlan*, 11 Ves. p. 516.

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in *Lamb v. Munster*, 10 Q. B. D. p. 111 : or to bring a criminal prosecution against him for a crime of which he is in fact innocent but of which on the facts he might be very probably accused : Stephen J. *ibid.* p. 114 : (as to his being in fact innocent, see Pollock, C. B. in *Adams v. Lloyd*, 3 H. & N. 363 : and Best, Evid. p. 123).

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## II. *As to the Manner of raising the Objection.*

The party must state on oath the ground of his objection to giving the required discovery, that is to say that it will (see as to the exact form *post*, Section IV.) tend to criminate him or subject him to a penalty or forfeiture, whether it be to answering an interrogatory: *Allhusen v. Labouchere*, 3 Q. B. D. 654: *Fisher v. Owen*, 8 Ch. D. 645: or to producing a document: see *ante*, p. 314, citing *Webb v. East*: and although the tendency may be apparent on the face of the interrogatory: *Allhusen v. Labouchere*, *post*: or the document be obviously of such a character: see *Webb v. East*, cited *ante*, p. 315: see also *Hill v. Campbell*, cited *post*, p. 320. "Nobody" says James, L. J. p. 660, in *Allhusen v. Labouchere* (as to the common law practice see *post*, p. 319) "was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it never was a ground of demurrer (but see *post*, p. 318) to an interrogatory or a ground for striking it out that the answer might involve him in a crime. I have known questions put to a man such as whether he had not forged a bill of exchange or forged a deed which was sought to be set aside by a bill in chancery. Of course he would not be obliged to answer such questions, but the questions were put and could not be objected to." So Cotton, L. J. in the same case, p. 666, says that according to the old chancery practice it was no objection to an interrogatory and no ground for taking it off the file that the answer might tend to criminate the party, and that he must take the objection on oath: and see Jessel, M. R. in *Fisher v. Owen*, pp. 651—652, where he says that it is not and never was an objection to an interrogatory that answering it might tend to criminate the party because allowing it leaves him at liberty to decline answering it on that ground or to answer it by denial either more or less complete. And see *post*, p. 318, referring to *Atherley v. Harrey* and *Fisher v. Owen*.

Some of the common law judges (see for instance Martin, B. in *Tupling v. Ward*, 6 H. & M. p. 753) were loth to allow (see *post*, p. 319, as to the common law practice) interrogatories of this nature on the ground that the party must necessarily (though otherwise in theory, see *ante*, p. 315) be prejudiced (and in particular before a jury, see *Lamb v. Munster*, 10 Q. B. D. p. 112)

by his refusal to answer them. Other judges refused to consider this a ground for disallowing them (see Erle, C. J. in *Bartlett v. Lewis*, 12 C. B. N. S. 257, p. 260: Willes, J. *ibid.* p. 263), regarding the party in the same position as a witness: see *Osborn v. London Dock Co.* 10 Exch. 698.

In *Hill v. Campbell*, L. R. 10 C. P. 242 (and see further this case *post*, p. 320), Brett, M. R. did not consider it unfair and unjust (see *post*, p. 319) that the question should be put even where the answer *prima facie* must lay the party open to a criminal charge. But the same judge in *Allhusen v. Labouchere*, p. 662, seems to have considered that there was some danger in introducing this rigid chancery rule into every kind of common law action: on the other hand James, L. J. p. 661, in the same case considered that if rigidly kept within the limit of strict materiality and relevancy there was very little chance of injury.

Where an interrogatory is obviously of a criminatory character and is not material, it is scandalous: see *ante*, p. 105.

### The old chancery practice.

In reference to the passages from the judgments in *Allhusen v. Labouchere* and *Fisher v. Owen*, cited *ante* (and see also *Atherley v. Harvey* and *Fisher v. Owen*, *post*) it seems, see Redes. Pl. 284: Beames, Eq. Pl. 259: Hare, p. 149: Dan. Ch. Pr. 481: that the proper mode of taking objection to discovery of this nature was by demurrer (or by simply declining to answer the question, see Hare, p. 149) if the objection was apparent on the face of the bill, by plea if it was not so apparent setting forth by what means he would be liable to such consequences, it being however always open to the party to take the objection in his answer: see Redes. Pl. 307: Wigr. Pl. 269: Hare, p. 262: *A. G. v. Lucas*, 2 Ha. p. 569, where Wigram, V. C. observed that there were certain questions which the defendant was not bound to answer, among them being matters which might subject him to pains, penalties and forfeitures, and that with respect to these questions it was perfectly immaterial whether the objection was taken by demurrer or answer: and see Wigr. Pl. 130—147. In *Scott v. Miller*, Johns. p. 332 (see also *The Mary*, L. R. 2 A. & E. p. 324) Lord Hatherley insists that he must have the security of the party's oath that he believes the answer to the question would tend to subject him to penalties. But in that case the discovery on the face of it showed no liability of the kind, and the party's mere submission that it would have that tendency was clearly insufficient: see *post*, p. 329.

In *Atherley v. Harvey*, 2 Q. B. D. 524, an action for libel, the common law judges struck out interrogatories (asking in effect whether the defendant composed or published the alleged libel) as tending to criminate the defendant, following the practice in equity under which (see p. 528), as they understood it (referring to Dan. Ch. Pr. p. 1409), a bill for discovery which might expose the person interrogated to criminal proceedings was demurrable, and therefore these interrogatories would have been demurrable (see also *Hill v. Campbell*, *post*, p. 320). It is to be observed however that the practice is stated in Dan. Ch. Pr. p. 1409, in these terms: "A bill of discovery in aid of an action at law will not be entertained where the whole object of the bill is to obtain discovery of matters which would if established subject the defendant to penal consequences, nor it seems where the discovery is sought in aid of an action for a mere personal tort:" a proposition the first portion of which is undoubted, see *post*, p. 349: and Cotton, L. J. in *Fisher v. Owen*, 8 Ch. D. p. 654, referring to this case considers that they erroneously applied the rule which did exist in equity namely that a bill of discovery in aid of an action for tort (see *post*, p. 346, as to actions for tort) was demurrable, for that such a rule had no application where an action was properly brought in a court which had power to enforce discovery by means of interrogatories.

### A witness.

In the case of a witness at common law (see *post*, however, as to the practice in discovery) it seems to have been the more recent practice to insist in every case upon his taking the objection on oath: see *Boyle v. Wiseman*, *Osborn v. London Dock Co.* 10 Exch. 647, 698: Tayl. Evid. §§ 1465—1466: *Paxton v. Douglas*, 16 Ves. p. 242. And Lord Eldon by analogy to this practice held that, when a witness was examined on interrogatories before a master or examiner, the question must be put and he must take the objection himself so that the court might have the sanction of his oath for the facts on which the objection was founded, the objection being not to putting the question but to the answering it: see *Paxton v. Douglas*, 16 Ves. pp. 242—244: *Parkhurst v. Lowten*, 2 Sw. pp. 197, 204.

### The common law practice.

The practice at common law was said by Thesiger, L. J. in *Fisher v. Owen*, pp. 655—657, to be much the same as that in equity (where if the question was strictly material and relevant to an issue it must be put: see James, L. J. in *Allhusen v. Labouchere*, 3 Q. B. D. p. 661, and *ante*, p. 317), that is to say, to allow the interrogatories, if it was considered that they were put bonâ fide for the purpose of assisting a definite case raised on the pleadings, and intended to be supported by evidence leaving the party to take objection on oath in his answer. The reported cases however (and see *ante*, p. 318, as to the application to common law cases of the rigid rule in chancery) at common law show a considerable divergence of practice: see *The Mary*, L. R. 2 A. & E. p. 321. Although it was sometimes considered that whenever the interrogatories were bonâ fide and material, they should be allowed: see *McFarden v. Mayor of Liverpool*, L. R. 3 Ex. 279: it seems to have been generally considered that there must be special or exceptional circumstances to make it fair and just that they should be allowed: see Brett, M. R. in *Hill v. Campbell*, L. R. 10 C. P. pp. 241—242, and in *Inman v. Jenkins*, L. R. 5 C. P. p. 742: and see the cases *post*. It was a matter entirely for the discretion of the judge in chambers to say whether there were such special circumstances, and the court would not interfere with the exercise of this discretion unless it saw clearly that he was wrong: *Villeboisnet v. Tobin*, pp. 190—191.

Generally the judges considered that they were not bound by the practice in equity in regard to interrogatories of this nature, and that they were free to allow or disallow them without regard to the question whether or not such discovery would have been demurrable in equity: see the judgments in *Bartlett v. Lewis*, *Bickford v. D'Arcy*, and *Hill v. Campbell*, *post*.

The following are the principal cases under the C. L. P. Acts; see Brett, M. R. in *Hill v. Campbell*, reviewing them (see also as to actions for libel and other actions for personal tort *post*, Section X: and actions for libels in newspapers *post*, p. 330);—

### Interrogatories by Plaintiff.

*Greenfield v. Reay*, L. R. 10 Q. B. 217 (action for libel)—whether defendant had not been instrumental in printing and publishing the libel—allowed.

*Inman v. Jenkins*, L. R. 5 C. P. 738 (action for libel)—whether defendant wrote and sent the letter containing the libel to *The Times*—allowed, the only question being whether the libel was true, and therefore this interrogatory being little more than a matter of form.

In an Irish case of *McLoughlin v. Dwyer*, 8 Ir. R. C. L. 170, an action for libel, the defendant was compelled to answer as to the writing and the contents of the libellous letter on the ground that the libel was not one which would justify the institution of criminal proceedings (see also *British, &c. Co. v. Wright*, *ante*, p. 159, where no objection on this ground was raised: and see *Dalrymple v. Leslie*, cited *ante*, p. 131).

*Davis v. Grey*, 30 L. T. 418 (action against the secretary of the Board of

Trade for libel)—to prove malice for the purpose of rebutting a possible defence of privilege—disallowed.

*Edmunds v. Greenwood*, L. R. 4 C. P. 70 (action for libel)—asking in detail as to the publication of the libels—disallowed.

*Baker v. Lane*, 3 H. & C. 544 (action for libel)—plea, not guilty—asking as to publication and also as to matters exposing to penalties under 6 & 7 Will. 4, c. 76, ss. 6 and 7—disallowed.

*Tupling v. Ward*, 6 H. & N. 749 (action for libel)—asking as to publication—disallowed—compare *Villeboisnet v. Tobin*, and *Bartlett v. Lewis*.

*Villeboisnet v. Tobin*, L. R. 4 C. P. 184 (action against directors for fraudulent misrepresentations in prospectus)—in detail as to the facts the subject of the misrepresentations—disallowed.

*McFadzen v. Mayor of Liverpool*, L. R. 3 Ex. 280 (action for malicious arrest and false imprisonment)—asking the town clerk whether and how he took part therein—allowed.

*Bartlett v. Lewis*, 12 C. B. N. S. 249 (action on bill of exchange)—plea, bankruptcy and payment—inquiring into matters which might involve an offence under the bankruptcy laws to show that defendant's certificate was void—allowed. (But see an old case *Ex parte Mawson*, 6 Ves. 613, bill of discovery of acts to vitiate certificate.)

*Bickford v. D'Arcy*, L. R. 1 Ex. 354 (action against attornies for not properly investing money)—interrogatories directed to prove partnership against a defendant which he objected to answer as involving him in a misdemeanor, under 6 & 7 Vict. c. 73, s. 2, for practising without a certificate—allowed as being bonâ fide and partly also on ground that investing money or acting as a scrivener was not necessarily incident to the profession of an attorney.

### Inspection by Plaintiff.

*Stein v. Tabor*, 31 L. T. 444 (action for libel) inspection of a document before declaration—refused on the ground that plaintiff had not stated that the defamatory matter was published nor that he had been injured thereby.

In *Collins v. Yates*, 27 L. J. Ex. 150, the plaintiff was allowed to inspect the defendant's business books, the inspection being required in order to disprove the plea of justification, not to prove the libel and therefore not criminatory.

In *Hill v. Campbell*, L. R. 10 C. P. 222, an action for libel, the plaintiff applied for inspection of the document alleged to contain the libel. The court (Coleridge, C. J. and Grove, J.—Brett, M. R. diss.) considering themselves bound on an application under section 6 of 14 & 15 Vict. c. 99, by what they believed to be the practice in equity, namely that a bill for such discovery would have been demurrable either as being in aid of an action for libel (see *ante*, p. 318), or as showing on the face of it that it would expose the defendant to criminal proceedings (see *ante*, p. 318), refused to insist upon an affidavit by the defendant that its production would tend to expose him to an indictment as a condition of protecting it, though it seems the decision would have been otherwise if application had been made under sect. 50 of the C. L. P. Act, 1854, in respect of which (see *ante*, p. 9) they were not bound by the practice in equity.

### Interrogatories by Defendant.

*Osborn v. London Dock Co.* 10 Exch. 698 (action for detinue and trover)—inquiring into matters which might be made the subject of an indictment for fraud—allowed by analogy to the case of the witness who must take the objection on his oath, see *ante*, p. 319.

*Zychlinski v. Maltby*, 10 C. B. N. S. 838 (action for malicious prosecution on charge of obtaining money by false pretences), inquiring into the matters the subject of the charge—allowed.

*Stewart v. Smith*, L. R. 2 C. P. 293 (action for malicious prosecution for theft)—following *Zychlinski v. Maltby*—allowed.



### III. *As to the Nature and Scope of the Objection—as to its Conclusiveness.*

See as to the actual form of the oath Section IV.

The party is protected from answering not only what must but what may subject him to the criminal prosecution, forfeiture or penalty: see *Harrison v. Southcote*, 1 Atk. p. 539: 2 Ves. p. 395: *McCallum v. Turton*, 2 Y. & J. p. 193, cited *post*, p. 326: and see *ante*, p. 315, and *post*, pp. 326—327. Though upon the particular circumstances of the case it might not possibly create a forfeiture as it does not appear at present with certainty whether such a discovery would create a forfeiture yet eventually it may do so: *Harrison v. Southcote*, 1 Atk. p. 539.

The protection includes not only the actual fact, that is to say, the question whether or not he did the act on which penal proceedings might be instituted against him, but also what have been called the collateral facts. He is protected from answering not only the fact but even the circumstances though they have not such an immediate tendency to criminate: *East India Co. v. Campbell*, 1 Ves. p. 247: Redes. Pl. 194: and see *Parkhurst v. Loucen*, 2 Sw. p. 215: not only the broad and leading fact, but any fact the answer to which may furnish a step in the prosecution if any person should choose to indict him: *Claridge v. Hoare*, 14 Ves. p. 65: and see extracts from the judgments in *Lamb v. Munster*, *ante*, p. 315, and *post*, p. 328: or form a link or stage in the chain of proof: *Short v. Mercier*, 3 M. & G. pp. 216—217: 2 D. G. & Sm. p. 649: *post*, p. 326: *Claridge v. Hoare*, p. 65: *Lee v. Read*, 5 Beav. p. 383: *Southall v. —*, Y. p. 317: Wigr. Pl. 138: Blackburn, J. in *R. v. Hulme*, L. R. 5 Q. B. p. 384: should an indictment be preferred: *McCallum v. Turton*, 2 Y. & J. p. 195: and see Tayl. Evid. § 1454: any fact which has a tendency to expose him to penal proceedings: *U. S. A. v. Macrae*, L. R. 3 Ch. p. 83: *Ex parte Symes*, 11 Ves. p. 523: *Parkhurst v. Loucen*, 2 Sw. p. 202: and see *post*, p. 328 as to the exact form of words to be used in taking the objection.

The cases to be considered in this connection may be divided



into four classes: (1) where the avowed purpose of the discovery is to prove the matter in respect of which the party may be liable to penal proceedings, though the object of the adversary is to obtain only such a civil and non-penal remedy as a court of law or equity could properly give: (2) where there is no such avowed purpose but where it is apparent on the face of the interrogatory either by itself or taken in conjunction with the other interrogatories that the answer (and similarly with regard to production of documents) must or may have the effect of exposing or might have a tendency to expose the party to a criminal charge penalty or forfeiture: (3) where it is not so apparent and the party alleges further matters or facts to show the effect or tendency of the discovery in combination with such matters or facts: see Hare, p. 149: (4) where the party is practically unable to state all the matters or facts necessary to show the effect or tendency and where the court must therefore to some extent rely on the oath of the party who alone knows all the facts and the use that could be made of them. See classes (3) and (4) discussed *post*, p. 325.

The proposition as to including collateral facts within the protection extends equally to all four classes: it applies whether the connection is apparent or must be shown aliunde: see Hare, p. 152. The objection is founded not on the purpose for which the question is put but on the use that might be made of the answer to it: see *Short v. Mercier*, 3 M. & G. p. 215: and *post*, p. 324. The only difference lies in the difficulty of applying it in classes (2), (3) and (4): see Hare, p. 149. There can of course be no rule the variety of circumstances is so great. Some limit must be placed upon its application. There is no fact which may not in some conceivable case form an ingredient in the evidence of a crime: see Hare, pp. 154—155: or a link in a chain leading to a conspiracy: *A. G. v. Daly*, Hay. & J. p. 383: *A. G. v. Conroy*, 2 Jon. p. 795: and see *Sidebottom v. Atkins*, 3 Jur. N. S. p. 633.\*

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\* The following cases are illustrations. But as said by Lord Eldon in *Par-ton v. Douglas*, 19 Ves. p. 227, the distinction between questions held to have

In class (1) (see *ante*) the tendency of any particular question is manifest, for it is incidental to and intended to lead up to the ultimate object of the discovery.

If a series of questions are put all meant to establish the same criminality you cannot pick out a particular question and say if that alone had been put

a tendency to criminate and questions held to have no such connection are very nice, his own inclination being to protect the party against answering any question that formed a step towards criminating him:—

Where the bill represented a transfer of stock as part of a transaction which altogether amounted to an offence (compounding a felony), discovery as to the object of the transfer might it was considered bring proof from the defendant of the transaction and was not compelled: *Claridge v. Hoare*, 14 Ves. 59.

Where a woman forfeited a legacy on marriage without consent her demurrer to discovery of the fact of marriage was allowed, for she could not answer without showing at the same time that it was against consent: *Chauncey v. Tahourden*, 2 Atk. p. 393: and see *Chauncey v. Fenhoulet*, 2 Ves. 264: and *A. G. v. Lucas*, 2 Hare, 566.

Where a party was asked whether he had or had not a legitimate son it was held that the question must be answered as it did not tend to discover whether he cohabited with any woman, though the discovery of his marriage with the mother of the son might, and therefore he was not compelled to discover the marriage: *Finch v. Finch*, 2 Ves. 491, p. 493: Redes. Pl. 286.

Where the bill stated the defendant's marriage with a particular woman and the defendant pleaded matter to show that such a marriage would have been incestuous the plea was held good: *Brownsword v. Edwards*, 2 Ves. 242: and see *Claridge v. Hoare*, 14 Ves. p. 65.

If in a bill to set aside a usurious contract it should be asked what interest he agreed to take he could not answer it without discovering what he did take: see *Chauncey v. Tahourden*, 2 Atk. p. 293.

In an old case of *Chambers v. Thompson*, 4 B. C. C. 435, it was said "You cannot ask a man whether he intended to defraud his creditors nor whether he has committed an act of bankruptcy but you may ask whether he traded or not:" though only a trader could be made a bankrupt.

If a bill were filed for discovery of waste charging that the defendant was tenant for life and that he committed waste and praying discovery whether he was tenant for life, he might plead to the discovery whether he had committed waste, but not whether he was tenant for life: he could only plead to the act (the waste) causing the forfeiture; and so he could not plead to a particular fact in a bill whether he was tenant for life that he had made a lease for the life of another which would operate as a forfeiture: *Weaver v. Meath*, 2 Ves. 108.

Where it was alleged that the witness by whose evidence a verdict had been obtained had been suborned by the defendant the defendant was allowed to demur to discovering even whether the verdict was not principally obtained or influenced by the evidence of this witness: *Baker v. Pritchard*, 2 Atk. 387.

A witness against whom an indictment for usury was pending was protected from answering whether a bill was in his possession on the ground that it might tend to convict him of the offence of usury: *Cates v. Hardacre*, 3 Taunt. 424.

Where the holding of a particular office involved the forfeiture of a seat in parliament a member was protected from answering whether the office was not held in trust for him in the last parliament: for the House might unseat him on the assumption that it was still held in trust for him: *Honeywood v. Selwyn*, 3 Atk. 275.

See also *Mitchell v. Koecker*, 11 Beav. 382: *Bracy's case*, 1 Lord Raym. 99.

it might have been answered. If it is one step having a tendency to criminate him he is not to be compelled to answer: Lord Eldon in *Paxton v. Douglas*, 16 Ves. p. 242: and see *Parkhurst v. Lowten*, 2 Sw. p. 215.

In no stage of the proceedings in this court can a party be compelled to answer any question accusing himself, or any one in a series of questions that has a tendency to that effect, the rule in these cases being that he is at liberty to protect himself against answering not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him: Lord Eldon in *Paxton v. Douglas*, 19 Ves. pp. 226—227: as for instance if the question is why the debt was not proved under the commission, the object being thereby to lay the foundation of an inference that the party acted illegally in taking the bond, he has an equal right to protection against that question: *ibid.*; or if the question be first whether the party has received the money, second how it has been applied, the first if connected with the other has a tendency to bring him into that situation in which he may avail himself of the principle: Lord Eldon in *Ex parte Symes*, 11 Ves. p. 523.

These dicta of Lord Eldon were commented on by Sir A. Hart in *Green v. Weaver*, 1 Sim. pp. 430—431: and he there limited their application to cases where the sole gist and object of a suit was to get relief (such as a penalty) which a court of equity would not give, and where therefore all incidental discovery required as leading to that conclusion would be refused. This criticism or explanation of Lord Eldon's dicta is dissented from by Mr. Hare, see Hare, p. 154, and justly so. The purport of Lord Eldon's observations is clear. He was addressing himself to the case where a plaintiff seeks to prove certain matter which might be made the subject of penal proceedings not for the purpose of such proceedings but in order to found thereon a claim for equitable relief. Mr. Hare observes that there are many authorities which establish the claim of collateral questions to protection where the suit is strictly of equitable cognizance. But in fact the point of view from which the subject is discussed is always the use that might be made of the discovery, not the purpose for which it is professedly sought: see Hare, p. 133 and *ante*, p. 322. The question is not the plaintiff's title to the relief, but whether and how far the defendant is to help him with evidence: *Short v. Mercier*, 2 D. G. & Sm. p. 649. He may go on to get his relief if he can by his own evidence though he has not been able to establish his right by the defendant's answer: see *Brownsword v. Edwards*, 2 Ves. pp. 245—246: *A. G. v. Brown*, 1 Sw. p. 294: Redes. Pl. 196: *Mitchell v. Koecker*, 18 L. J. Ch. 294: *U. S. A. v. Macrae*, L. R. 3 Ch. p. 88.

In *Thorpe v. Macaulay*, 5 Mad. 218, p. 229: *Glyn v. Houston*, 1 Keen, 329, p. 337, the whole object of the bills was to procure evidence of matter which might be made the subject of a criminal charge and the party was (or would have been, see *post*, p. 349 as to *Thorpe v. Macaulay*) protected from answering any questions however apparently indifferent as they were all put with that view. See also *Southall v. ———*, Y. 308; *Parkhurst v. Lowten*, 2 Sw. p. 215: *McCallum v. Turton*, 2 Y. & J. 186 (where the party was protected from answering allegations which might be made stages of proof in an indictment for fraud): *Cartwright v. Green*, 8 Ves. 405 (where the object of the bill was to prove matter amounting to a felony, Lord Eldon however basing his decision on the view that the discovery was sought in aid of an action founded on felony and that the policy of the law required that the court should not give discovery in aid of such an action, see Hare, p. 134).

So a tendency will readily be assumed in cases such as *Lee v. Read*, 5 Beav. 381, pp. 385—387, and *Waters v. Shaftesbury*, 14 W. R. 259, where proceedings for an indictment in respect of the same matters were actually pending.

*Classes (3) and (4) see ante, p. 322.*

Where the objection is not apparent on the face of the interrogatory or interrogatories, or on the application for production (on the face of the bill under the old practice so that he could not demur, see *ante*, p. 318) the party may and as far as practicable must state (by plea or answer under the old practice, see *ante*, p. 318) further matters or facts so as to show by what means he may be liable to punishment: see *Redes. Pl. 284, 286*; *Hare*, pp. 149, 263—264; *Paxton v. Douglas*, 16 Ves. p. 242.

The adversary does not always charge or state his facts so as to show the illegality against which the party seeks to protect himself: *Short v. Mercier*, 2 M. & G. p. 216; and see *Wich v. Parker*, 22 Beav. p. 67. But the adversary cannot deprive the party of protection by stating his case untruly or a case of innocence: *Short v. Mercier*, 2 D. G. & Sm. p. 649; and see *A. G. v. Conroy*, 2 Jon. 791.

The purpose of the plea in *Claridge v. Hoare*, 14 Ves. 59, p. 65, was to state clearly the connection of the facts so as to show their criminal nature, the bill not so distinctly stating them.

The following cases may be noted as further illustrations:—*Brounsword v. Edwards*, 2 Ves. 243 (referred to in *Claridge v. Hoare*, p. 65) where to discovery whether he was married to a particular woman the defendant pleaded that she was his sister and therefore if real the marriage was incestuous (ecclesiastical offence): *Hatfield v. Hatfield*, 5 B. P. C. pp. 102—103, where the defendant pleaded matter to show that an answer would show him guilty of bigamy: *Sharpe v. Carter*, 3 P. W. 375, where defendant pleaded that a certain contract if any was made after the seller was out of possession and the required discovery would expose him to penalties under the statute against contracting for pretended titles.

Where the adversary, it was said, seeks discovery of matters which might subject a party to a prosecution, and also seeks legitimate discovery, it is his duty to separate the two, for if they are so mixed up or connected that either by inference or exclusion they may lead to a disclosure which might subject the party to a prosecution he is not bound to give any portion of the discovery: *Lichfield v. Bond*, 6 Beav. 88, pp. 94—95. But where the matters inquired into are apparently lawful the party cannot refuse to answer them altogether because some are unlawful, for it is for him to distinguish, because it is he who sets up the illegality: *Fisher v. Price*, 11 Beav. 194, pp. 199—200.

Where all the matters and facts on which the party relies as showing his liability are before the court the court is able to form its own opinion: (1) whether there is any liability

at all : see *Scott v. Miller*, Johns. 220, p. 223 : *Williams v. Trye*, 18 Beav. p. 368 : *R. v. Charlesworth*, 2 Fost. & Fin. 326 : *Sidebottom v. Atkins*, 3 Jur. N. S. 631 : *King of Two Sicilies v. Willcox*, 1 Sim. N. S. p. 330 : *U. S. A. v. Macrae*, L. R. 3 Ch. pp. 84—85 : *Re Mexican, &c. Co.* 4 D. G. & J. 320, p. 324, affirming 27 Beav. 474 (in which case and also in *Scott v. Miller* and *Sidebottom v. Atkins* it was held that no ground for any liability was shown) : (2) as to the tendency of any particular question or questions : see *Short v. Mercier*, 2 D. G. & Sm. pp. 649—650 : on app. 3 M. & G. pp. 215—218 : and see the cases cited in the note, *ante*, p. 322.

In *McCallum v. Turton*, 2 Y. & J. 183, p. 193, Alexander, L. C. B. observed that the question for the court was whether upon the facts alleged in the bill, and which must for the purpose of the demurrer be admitted to be true, there was or was not a probability that the defendant might be indicted for the fraud imputed to him by the bill, and considered that it was not incumbent on him to express any positive opinion on that point, for if there were a reasonable probability the court would not compel him to answer “not only what must but what may” subject him : see Lord Hardwicke in *Harrison v. Southcote*, 2 Ves. p. 395 : 2 Atk. p. 539 : and *ante*, p. 321.

In *Nelme v. Newton*, 2 Y. & J. pp. 186—187, the liability to a penalty which was alleged by the party as a ground for refusing to answer depended upon his knowledge of the fact whether his partner was qualified to act as notary. Sir John Leach considering that he ought not to be put to the risk of having to prove his ignorance protected him from answering ; so subsequently Lord Eldon in the same case in reference to production of documents : and see *Mitchell v. Koecker*, 11 Beav. 380, p. 382.

In *Re Mexican, &c. Co.* referred to above, the judgment in the court below, see p. 384, was based rather on the view that there was no liability unless a particular misrepresentation had been fraudulently made : and see *Bunn v. Bunn*, *post*, p. 341, as to a similar suggestion.

In *Short v. Mercier*, 3 M. & G. pp. 216—217, Lord Truro points out how a particular fact might constitute a link in the chain of evidence against the defendant : and see *ibid.* 2 D. G. & Sm. p. 650.

The party however cannot always practically put the court in possession of all the facts : see class (4) *ante*, p. 322. To show to what extent the discovery would affect him might often of necessity involve depriving himself of the benefit he is seeking : *Short v. Mercier*, 3 M. & G. p. 217 : and see *post*, p. 328 : and *ante*, p. 315. In cases of this kind the question was much discussed whether, as the party alone knew all the circumstances and the use that might be made of the answer to a particular question, he was to be the sole judge of the tendency of such answer, and his assertion on oath to that effect was to be accepted by the court as conclusive : see for instance *R. v. Garbett*, 2 C. & K. 474, p. 495. The fol-

following extract from the judgment in *Reg. v. Boyes*, 1 B. & S. p. 329 was approved by the Court of Appeal in *Ex parte Reynolds*, 20 Ch. D. 294 (and see also *Ex parte Fernandez*, 10 C. B. N. S. pp. 18—20, and 40) as correctly stating the law applicable to a witness in such cases. And the law is the same as to discovery: see *Sidebottom v. Atkins*, 3 Jur. N. S. 631: 5 W. R. 743: *Short v. Mercier*, 2 D. G. & Sm. p. 650: 3 M. & G. p. 218, referring to *R. v. Garbett*. “It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities we are clearly of opinion that the view of the law, propounded by Lord Wensleydale in *Osborn v. London Dock Co.* 10 Ex. 698, and acted on by Stuart, V.-C. in *Sidebottom v. Atkins*, is the correct one: and that to entitle a party called as a witness to the privilege of silence the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: there being no doubt, as observed by Baron Alderson in *Osborn v. London Dock Co.* that a question which might at first sight appear a very innocent one might by affording a link in the chain of evidence become the means of bringing home an offence to the party answering. Subject to this reservation a judge is in our opinion bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.” And the judgment goes on to say that the danger must be real and appreciable, and not of an imaginary and unsubstantial character having reference to a contingency so impossible that no reasonable man would suffer it to in-



fluence his conduct, (in the particular case an impeachment by the House of Commons for bribery).

The decision in *R. v. Garbett* was in harmony with the principles here laid down. There it was held that a witness claiming protection was not compellable to answer where there appeared reasonable ground for thinking that it would have the alleged tendency, the judges refusing to decide whether in every case the party's declaration on oath was to be accepted where sufficient circumstances did not appear in the case to induce the judge to believe that the answer would have such a tendency.

In *Fisher v. Ronalds*, 12 C. B. 762, though there were dicta of the judges which went beyond these principles, the particular question which the witness refused to answer was evidently one having such a tendency.

The remarks of Lord Truro in *Short v. Mercier*, 3 M. & G. p. 218 are not inconsistent with the views laid down in *R. v. Boyes* and *Ex parte Reynolds*. "The point," he observes, "is not whether there is illegality about a particular fact insulated and unconnected; but, if the fact forms one of a series and a party declines to answer who alone knows all the circumstances and how the fact is connected with others which may form the chain, I apprehend the court would be disposed to assist the party:" and so at p. 217 he says, "The party is not bound to show to what extent the discovery will affect him, for to do that he might often of necessity deprive himself of the benefit he is seeking. It will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged and which also render it extremely probable:" and see observations of Bovill, C. J. in *Bowden v. Allen*, 22 L. T. p. 342: *Adams v. Lloyd*, 3 H. & N. pp. 362, 363: and an American case *The People v. Mather*, 4 Wend. p. 254, pointing out that if the witness were obliged to show how the effect is produced the protection would be annihilated: and see *ante*, p. 326.

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#### IV. *The actual Form of the Oath.*

If in the opinion of the judge looking at the nature and all the circumstances of the case the answer would be likely to have or probably would have a tendency to criminate him or may not improbably be of such a nature as to endanger him the exact form of words, "will" "would" "may" "might" "I think it may" "I believe it will" "I am advised it will," is not material: see *Lamb v. Munster*, 10 Q. B. D. pp. 111, 114. This was an action for libel and the defendant refused to answer interrogatories asking in effect whether he published the libel on the ground that his answer to them might tend to criminate him. See also *ante*, p. 315.

See as to the meaning of a tendency to criminate, *ante*, p. 315, n.

Where however the tendency of the answer is not so clear,



see *ante*, p. 322, and especially under the circumstances considered *ante*, p. 325 to p. 328, a party cannot be advised to use a less absolute assertion than that he believes that the answer would tend to criminate him or expose him to a forfeiture or penalty: see *Scott v. Miller*, Johns. p. 332 (where a mere submission that it would have such a tendency where no such tendency was apparent was held insufficient), or that to the best of his knowledge information and belief it would have that effect: See *Webb v. East*, *ante*, p. 314 n.

So it has been held (*ex rel.*) that where the effect of a document is not apparent, an absolute assertion of this kind is necessary in order to protect the document from production.

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#### V. *Exceptions from and Qualifications of the Rule as to Criminatory or Penalising Discovery.*

##### (a) *By Statute.*

In some cases the same statute which has declared some transaction illegal and has imposed a penalty thereon has also provided that the liability shall not constitute an objection to giving discovery or evidence in civil proceedings: see *Smith v. Read*, 1 Atk. p. 527, referring to 9 Anne, cap. 14: Redes, Pl. 288. To deprive a party of his right to refuse discovery or evidence a clear and unequivocal enactment was required: *Orme v. Crockford*, 13 Pri. p. 389: but see *post*, Bk. III. Ch. V. Sect. 2, as to a bankrupt.

See as to the protection afforded to documents referred to under such circumstances *R. v. Leatham*, 8 Cox, 498: 3 E. & E. 658.

See as to a certificate against liability for corrupt practices at elections under 15 & 16 Vict. c. 57: *R. v. Charlesworth*, 2 F. & F. 326.

The following statutes may be mentioned:—

9 Anne, c. 14—gaming transactions—in favour only of the loser not of an informer: *Orme v. Crockford*, 13 Pri. 376, disapproving *Cowan v. Phillips*, 3 Anst. 843: providing that the party is to be discharged from the penalty on giving discovery and making repayment.

7 Geo. 2, c. 8 (Stock-jobbing Act)—*Bullock v. Richardson*, 11 Ves. 373: *Billing v. Flight*: *Bancroft v. Wentworth*, 3 B. C. C. 11: and see *Pritchett v. Smart*, 18 L. J. C. P. 211: 7 C. B. 625 (production of broker's book to principal)—containing similar provisions to those of 9 Anne, c. 14.

24 & 25 Vict. c. 96 (Larceny Act)—qu. whether not in favour of informers: see *Anon.* W. N. 75, p. 219: but see also *post*, p. 345, and *Orme v. Crockford*, *ante*:—providing that the party is not to be convicted under the act if he shall have disclosed the fact by way of discovery or evidence under such compulsion.

25 & 26 Vict. c. 88 (Merchandise Marks Act)—providing that no such discovery or evidence is to be admissible in support of an indictment.

See as to disclosures by a bankrupt, *post*, Bk. III. Ch. V. Sect. 2.

See other acts referred to in Tayl. Evid. § 1455.

Discovery relating to the printing and publishing of libels in newspapers under 6 & 7 Will. 4, c. 76: 32 & 33 Vict. c. 24: 33 & 34 Vict. c. 99.

By 6 & 7 Will. 4, c. 76, s. 19, continued or re-enacted by 32 & 33 Vict. c. 24 and 33 & 34 Vict. c. 99 (see *Dixon v. Enoch*, L. R. 13 Eq. p. 398), it was enacted that "If any person shall file any bill in any court for the discovery of the name of any person concerned as printer publisher or proprietor of any newspaper or of any matters relative to the printing or publishing of any newspaper in order the more effectually to bring or carry on any suit or action for damage alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill: but such defendant shall be compellable to make the discovery required: provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant save only in that proceeding for which the discovery is made." (As to what is sufficient allegation of the libellous matter and the intention to bring an action see *Dixon v. Enoch*, L. R. 13 Eq. 394, p. 399.)

By force of this enactment a person complaining of a libel in a newspaper might file a bill against the printer and publisher to ascertain the names of the proprietors for the purpose of bringing his action against the proprietors alone: *Dixon v. Enoch*, pp. 400—401: the special rules of the Court of Chancery under which a bill for discovery could be maintained only against a person who was or was to be a party to the record at law and not against a mere witness (see as to this *ante*, p. 40 n, and Bk. III. Ch. X.), not being imported to that extent into this enactment, though qu. whether a person accidentally knowing the names of the proprietors but wholly unconnected with the newspaper, a mere witness in the strictest sense of the word, could be made a defendant for such a purpose: *ibid.* pp. 399, 400.

Since the Judicature Act (though otherwise before the act, *Bowden v. Allen*, 22 L. T. 342) a plaintiff is not obliged to file a separate bill of discovery in order to get the benefit of this enactment, but he may administer interrogatories in the action itself: *Ramsden v. Brearley*, 33 L. T. 322, where the defendant (the alleged publisher) was ordered to answer whether he was the publisher or printer of the paper: and see *Lefroy v. Burnside*, 41 L. T. 199: 4 L. R. Ir. 340.

In *Carter v. Leeds Daily News Co.* W. N. 76, p. 11, an action for libel against the company and another person, the latter was held bound to answer whether he or the company was the publisher or printer of the paper containing the libel and as to his duties of supervision over the paper and whether he was a shareholder, but not whether he was editor, nor as to writing or who was the writer of nor as to seeing or sanctioning the publication of the libel.

In *Wilton v. Brignell*, W. N. 75, p. 239 : 20 S. J. 121, an action for libel against the publisher of a newspaper, the defendant was compelled to answer whether he intended the passage in question to apply to the plaintiff, but not to what other person it applied nor whether he or who was the writer : (this last case of course has nothing to do with the act). See other libel cases referred to *ante*, p. 319.

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(b) *By Waiver—Lapse of Time—Death of Person entitled to sue—Pardon.*

The discovery must be given where the only person entitled to sue for the penalty or take advantage of the forfeiture waives the penalty or forfeiture : *Uxbridge v. Stareland*, 1 Ves. 55 : *Boteler v. Allington*, 3 Atk. p. 457 : *Mason v. Murray*, 3 B. C. C. 38 ; *A. G. v. Vincent*, Bunb. 192 : *U. S. A. v. Macrae*, L. R. 3 Ch. p. 89 : Redes. Pl. 195, 197 : *E. I. Co. v. Sandys*, 1 Vern. p. 128 : *A. G. v. Mico*, Hard. 201. In some of these cases (waste or tithes) the waiver was necessary even for the purpose of getting relief : see *U. S. A. v. Macrae*, L. R. 4 Eq. pp. 338—339 ; 3 Ch. p. 89.

An express waiver was necessary : Redes. Pl. 195, 197 : except in a bill for the single value of tithes, in which case a waiver of the penalty of treble value was implied and an action for the treble value would have been restrained : see Coop. Eq. Pl. 205 : *Woods v. Walley*, 1 Anst. 160 : *U. S. A. v. Macrae*, L. R. 3 Ch. p. 89 : 4 Eq. p. 339 : *Jackson v. Benson*, 1 Y. & J. 32, p. 34, where witnesses were ordered to answer on an undertaking not to sue them for the treble value.

Even the Crown must waive penalties in actions to recover customs or other duties, see *post*, p. 336.

So the discovery must be given if the time for recovering the penalty or taking advantage of the forfeiture has expired : *Davis v. Reid*, 5 Sim. 443 : *Parkhurst v. Lowten*, 1 Mer. p. 400 : *Roberts v. Allatt*, 1 Moo. & Malk. 192 : *A. G. v. Cresner*, Parker, 279 : even at the time of hearing the objection : *Burge v. Corporation of Trinity House*, 2 Sim. 411, where the time had expired at the hearing of the plea : and see *Williams v. Farrington*, 3 B. C. C. 38, where the time had expired at the date of putting in a further answer.

So the discovery must be given where the only person entitled to sue for the penalty or take advantage of the forfeiture is dead : *Anon.* 1 Vern. 60.

So also where the offence in question has been pardoned :

*Reg. v. Boyes*, 1 B. & S. p. 328 : though this seems to have been doubted in some earlier cases : *Roberts v. Allatt*, 1 Moo. & Malk. p. 193.

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(c) *Distinction between a Disability to take inflicted as a Penalty and a Disability arising from Policy or Rules of Law—Forfeiture by Outlawry—Discovery in aid of Execution.*

Under the rule that a man is not obliged to accuse himself is implied that he is not to discover a disability : and there is no difference between a forfeiture of a thing vested and a disability to take inflicted as a penalty : Lord Hardwicke in *Smith v. Read*, 1 Atk. p. 527 : and see *Harrison v. Southcote*, 2 Ves. 389, p. 394 : 1 Atk. 527.

During the period when papists were subject to certain incapacities in respect of the holding and conveying of land a party need not have discovered whether he or his predecessor in title was or was educated a papist : *Harrison v. Southcote*, 1 Atk. 527 : 2 Ves. 389 : *Smith v. Read*, 1 Atk. 526 : *Jones v. Meredith*, Com. 661, 664 : *Wynn v. Doughty*, 2 Eq. Ca. Ab. 77 ; the statute being a penal statute : *Smith v. Read* : these disabilities being considered to have the same effect with a forfeiture : *Boteler v. Allington*, 3 Atk. p. 457. So the avoidance of a living by the acceptance of a second living was held to be a forfeiture : *ibid.* So also simony : see *ante*, p. 312.

In an information (under the Marriage Act, 4 Geo. 4, c. 10, s. 23) seeking a declaration that a husband had forfeited his interest in his wife's property by procuring his marriage with her while a minor by falsely swearing that it was with her parents' consent, he was protected from answering as to these matters, Wigram, V. C. holding that neither on authority nor on principle was there any distinction between a case where the forfeiture was one which was intended to be enforced by a court of equity and the case where it was enforced in a court of law : *A. G. v. Lucas*, 2 Ha. 566, p. 569.

But the legal disability of an alien to hold lands was not a

penalty or forfeiture: *A. G. v. Duplessis*, Park. p. 163: 1 B. P. C. 415: 2 Ves. p. 287. In this case L. C. J. Willes, p. 163, gave it as his opinion that a penalty or forfeiture was inflicted for some act or neglect in contempt of the law, but the disability of an alien to hold lands arose from the policy of the law without any such act or neglect, and compared it to the incapacity of a feme covert to grant and said there was no difference in respect of the incapacity whether it was in the grantor or grantee. A demurrer would not hold to discovery of matter which would show the defendant incapable of having any interest or title: Redes. Pl. 197. So Lord Hardwicke in *Smith v. Read*, 1 Atk. p. 527, considered that there was a difference where the disability arose from the rules of law and where it was imposed as a penalty, giving as instances of the former the cases of an alien (but see 2 Ves. p. 493) a bastard, and the bankrupt laws as being not all penal laws. In *A. G. v. Duplessis*, Park. 144 (but see Lord Hardwicke in 2 Ves. p. 493), a mother was held bound to discover in favour of the Crown matters to show that both herself and her daughter were aliens and therefore incapacitated from holding certain property of which she was trustee for her daughter, having herself also a beneficial interest therein, for she was trustee for the Crown if her child was an alien: see Redes. Pl. 287. In Beames, Eq. Pl. 267—269, the case of *A. G. v. Duplessis* is disapproved on the ground that the question is not as to the origin but the effect of the disability, and the effect was to produce a forfeiture.

Discovery of an outlaw's estate was allowed in favour of the Crown to give effect to forfeiture occasioned by his outlawry, which was in the nature of a gift to or judgment for the king: *A. G. v. Duplessis*, Park. pp. 158—159: *Protector v. Lumley*, Hard. 22: 1 Eq. Ca. Ab. 75: there the effect is to discover what is already forfeited and not a cause of forfeiture: Hard. p. 145. See also Bk. III. Ch. IV. Sect. II. as to discovery in aid of execution.

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(d) *Distinction between Penalty or Forfeiture and mere Loss—  
between Forfeiture of an Interest and Determination by  
conditional Limitation.*

There is a wide distinction between penalty or forfeiture in the nature of a penalty and loss, especially loss in respect of interest only: Lord Eldon in *Parkhurst v. Lowten*, 1 Mer. p. 400.

As to the loss of a debt upon a contract void for usury or on other grounds.

The dictum of Lord Hardwicke in *Suffolk v. Green*, 1 Atk. 450, that "so far as this is proved relates to the loss of a debt so far it may be called a penalty," was disapproved in *Sloman v. Kelly*, 4 Y. & C. p. 172. As to the decision see *post*.

In *Sloman v. Kelly* (and see *Sidebottom v. Atkins*, 3 Jur. N. S. 631: 5 W. R. 743: and *Wilkinson v. L'Eangier*, 2 Y. & C. 366) it was held that discovery could not be refused for the purpose of showing that a certain security on which the defendant to the bill of discovery was suing at law was void under 9 Anne, c. 14 (repealed by 8 & 9 Vict. c. 109) as having been given for money lent at play, for that generally a party could not refuse discovery of the consideration for a bond, bill of exchange (referring to *Glengall v. Frazer*, 2 Y. & C. 125), or other security on the ground that it was such as to render it void and therefore to disable him from recovering upon it at law, reference also being made to the case of a party filing a bill to discover matters which would make a policy of insurance void: (see as to discovery in favour of underwriters, *post*, Bk. III. Ch. II.).

Both in the statute of 9 Anne, c. 14, and in the statute dealing with usurious contracts, there were certain matters which involved merely the loss of the security, and other matters which entailed a penalty. In *Sloman v. Kelly* this distinction was expressly recognized. In *Whitmore v. Francis*, 8 Pri. 616, a bill for discovery of usurious contracts, the distinction was alluded to in the argument, but the ratio decidendi does not clearly appear. In *Suffolk v. Green* (not correctly referred to by Lord Abinger in *Sloman v. Kelly*) the bill was regarded by Lord Hardwicke both as a bill to perpetuate evidence of witnesses to a usurious bond and also for discovery: and the lord chancellor held that as to the first point the demurrer was bad, but that as to the discovery a demurrer would be proper as subjecting him to a penalty, and that he might insist by answer against giving any discovery touching the usurious contract. See also a reference to discovery relating to a usurious contract in *Chauncey v. Tahourden*, 2 Atk. p. 293. In *Cates v. Hardacre*, 3 Taunt. 424, an indictment for usury was pending.

The following are extracts from the judgment of Lord King and the argument of the Solicitor General in an old case of *Wildbore v. Parker*, Mos. 80, 124 where it was sought to discover the consideration (to secure election) given for certain notes. "Notes are given for which there is no remedy at law, and the defendants file an information in the name of the Attorney General for the payment of them: must this court suppose the consideration expressed to be good without looking into it? Suppose a fraudulent note is obtained which yet appears fair on the face of it, though fraud is punishable by law, yet if the party comes here to have it executed or puts it in suit at law, on a bill for a discovery he must answer though it may subject him to a penalty (but see *Guiborn v. Fellows*, 2 Eq. Ca. Ab. 377, demurrer to discovery whether a promissory note was given to smother a felony); so if the defendants will not discover they shall have no benefit by the information; if that was out of the case I should be of another opinion. And though others

were present, if they were parties, they too may refuse to swear, because a discovery would subject them to punishment." Lord King, p. 126. The dicta suggesting that in such cases even exposure to penalties or punishment by law is no protection are clearly opposed to all authority, see *post*, p. 349. "Suppose then they had brought a bill for payment of these notes and on a cross bill for a discovery of the consideration, could they have demurred? Could they have said, 'No we will not tell; the court shall decree blindfold for us': it never was allowed a party to protect himself in this manner. The court indeed will stand neuter where a bill prays to be relieved against a corrupt agreement; but where the end of the bill is for a specific execution of it, it will certainly first examine into it, and they cannot mention the case of a bill for an execution of a contract and of a cross bill for a discovery that a demurrer to the discovery has been allowed; for that is to say that the court must decree what if they were acquainted with the whole truth they would not; no your lordship must be let into the whole affair." Solicitor General, p. 125.

In *Benyon v. Nettlefold*, 3 M. & G. 94, it was held that a defendant founding his defence on the illegal nature of the contract might have discovery to establish that it was void on the ground of immoral consideration: and see further this case *ante*, p. 3: and see *Williams v. Trye*, *post*, p. 342.

Discovery could not be refused relating to a secret parol trust by a testator for charitable or other purposes: *Adlington v. Cann*, Park. p. 159, discussed in *Muckleston v. Brown*, 6 Ves. 52, pp. 67—69: *Strickland v. Aldridge*, 9 Ves. 516, p. 519: *A. G. v. Johnstone*, W. N. 72 p. 12: and see *post*, p. 355.

There appears to have been some doubt how far a witness could refuse to answer a relevant question the answering of which had no tendency to accuse himself or expose him to any penalty or forfeiture but might establish or tended to establish that he owed a debt or was otherwise subject to a civil suit, and in consequence a statute 46 Geo. 3, c. 37 was passed to provide that he should not be entitled to refuse to answer such a question on that ground. See 2 Phill. Evid. p. 492: Tayl. Evid. § 1463: *Orme v. Crockford*, 13 Pri. p. 386: *Adams v. Lloyd*, 3 H. & N. p. 364: *Pye v. Butterfield*, 5 B. & S. pp. 832, 836: 34 L. J. Q. B. pp. 19—20, where Cockburn, C. J. suggested that "forfeiture" as used in this statute did not include forfeiture for breach of contract.

The Attorney General might bring a bill to discover what goods a person had exported or imported without paying customs, excise, prisage (as being an inheritance of the Crown) or other duties thereon for the purpose of recovering such duties, if the position was such that he was the only person



entitled to sue for the penalty, and he waived or was willing to forego his right to sue therefor (by analogy to the practice in the case of a bill for tithes see *ante*, p. 331): see *A. G. v. Mico*, Hard. 137, pp. 138, 145, 201: 1 Eq. Ca. Ab. 75: Hare, p. 145: *A. G. v. Cresner*, Park. 279: *A. G. v. Conroy*, Jones, 791: *A. G. v. Daly*, Hay. & J. 379.

Bills were allowed to discover tenures in capite as being in the nature of a reservation between landlord and tenant and the incidents thereto not being penal: *A. G. v. Mico*, Hard. p. 145.

The distinction between a forfeiture of interest strictly so called and the mere determination of an interest by force of a conditional limitation has been observed in this connection.

A condition by which a woman lost any property if she married without consent was held to be of the nature of a forfeiture, and her demurrer to discovery of the fact of marriage (see *ante*, p. 323) allowed: *Chauncey v. Tahourden*, 2 Atk. 392: *Chauncey v. Fenhoulet*, 2 Ves. 264: though the husband had answered: *Wrottesley v. Bendish*, 3 P. W. 235: and see *Jordan v. Holcombe*, Ambl. 209.

A provision by which a widow lost half her property if she married again was held to be a conditional limitation and a demurrer to discovery of the fact of marriage overruled: *Lucas v. Evans*, 3 Atk. 259.

The distinction was disapproved in Beames, Eq. Pl. 265—266. However it has been recognised too often to be questioned, and the old case of *Monnins v. Monnins*, 2 Ch. Rep. 36, contra, must be considered to be overruled: see *A. G. v. Lucas*, 2 Ha. p. 569: *Pye v. Butterfield*, 5 B. & S. 829, p. 837: 34 L. J. Q. B. pp. 20—21: *Hambrook v. Smith*, 17 Sim. pp. 216—218.

In *Hambrook v. Smith*, where a condition by which an estate was to go over on alienation was held a conditional limitation, Kindersley, V. C. at p. 218 said, "There is a distinction between cases of estates to endure for life but to go over in case of a particular act being done and cases of estates to endure until the happening of a certain event."

In *Cooke v. Turner*, 14 Sim. 220, a party was protected from answering as to a testator's sanity on the ground that by the will he was to forfeit an estate if he disputed the testator's competency to make it.

Mr. Hare thus states the distinction in Hare, p. 145:—If a bill seeks discovery of facts which would show that the defendant never had an interest in the property which he wrongfully retains or having had an interest that it has ceased by the taking effect of some limitation over, the defendant will not be permitted to set up the loss of possession which the proof of these facts would occasion as a ground for withholding discovery.

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(e) *Where the Party has subjected himself to certain Payments by his own Agreement—As to the Forfeiture of a Lease.*

In some cases the party has been held to have subjected himself to payments in the nature of a penalty by his own

agreement, whether by way of stipulated damages or not, and in such cases discovery has been enforced: *Redes*. Pl. 195—196: *Hare*, p. 139: *African Co. v. Parish*, 2 Vern. 244: *E. I. Co. v. Blake*, Finch, 121: *E. I. Co. v. Neave*, 5 Ves. 173, p. 185; cases where the company's servants entered into covenants to pay or allow in account certain sums in the event of their committing breaches of certain regulations. See also *Reg. v. Beaufort*, 2 Atk. 294: *E. I. Co. v. Neave*, pp. 179—183: *Sloman v. Walter*, 1 B. C. C. 419: *Lowe v. Peers*, 4 Burr. 2228. Mr. Hare, in *Hare*, p. 144, considers that it does not follow because in some cases such payments may have been regarded as stipulated damages for the purpose of relief that therefore they would have been so regarded for the purpose of discovery. In *Brodrepp v. Cole*, cited in *Redes*. Pl. 196: *Jones v. Green*, 3 Y. & J. 298: *French v. Maccale*, 2 Dr. & W. 269, payments agreed to be made by lessees in the event of digging sowing or burning land were not regarded as penalties so as to protect them from discovery of such matters.

A condition forfeiting a lease in case of the lessee's assigning or underletting without the lessor's consent: *Uxbridge v. Staveland*, 1 Ves. 55: *Fane v. Atlee*, 1 Eq. Ca. Ab. 77: *Pye v. Butterfield*, 5 B. & S. 829: *Browne v. Davies*, 2 L. R. Ir. 434: (or for breach of covenant to insure: see opinions in *May v. Hawkins*, 11 Exch. 210) has been held to be a forfeiture for the purpose of discovery: see also cases referred to *post*, p. 346.

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(f) *Where the Party has either expressly or by his Conduct or Position bound himself to give the Discovery—Broker—Bond of Broker: of Executor and other Persons.*

A party may have excluded himself from the benefit of the privilege (so far as penalties or forfeitures are concerned, not as regards criminatory matter, see *post*, p. 339) either by express contract with his adversary, as where supercargoes or servants or agents of the company covenanted with the company to answer any bills filed against them by the company (not by any other person, *Paxton v. Douglas*,

16 Ves. pp. 241—242) notwithstanding any penalties to which they might be subject under certain statutes or byelaws conferring exclusive rights of trading on the company: *E. I. Co. v. Atkins*, 1 Str. 168, p. 177: *Southsea Co. v. Bumsted*, Mos. 74: 1 Eq. Ca. Ab. 77: Redes. Pl. 185: *Paxton v. Douglas*, pp. 241—242: *Green v. Weaver*, 1 Sim. pp. 428—430.

Or he may by the effect of his own acts exclude himself from the benefit of the rule: *Green v. Weaver*, p. 427.

He may incur a moral obligation to give the discovery as for instance by accepting the relation of agent to principal: for a court of equity recognizes no difference between a moral obligation and one resulting from stipulation by deed: *Green v. Weaver*, p. 431:\* Hare, p. 140.

Parties holding themselves out as brokers were not allowed to withhold from persons, who had employed them in the confidence that they sustained that character and that they would be accountable to them as their agents, discovery of matters transacted by them for such persons, on the ground that such discovery would subject them to penalties under 57 Geo. 3, c. 40, for not having properly qualified themselves to act as brokers: *Robinson v. Kitchin*, 8 D. G. M. & G. 88, affirming 21 Beav. 365: *Green v. Weaver*, 1 Sim. 404, p. 432, a similar case, see 8 D. G. M. & G. p. 92.

In *Robinson v. Kitchin*, 21 Beav. pp. 371—372, Romilly, M. R. based his decision upon the ground that parties who held themselves out as brokers impliedly assert that they have done everything to properly qualify themselves to act as such and are therefore bound to make this assertion good; preferring this ground to the ground of implied contract adopted by Sir A. Hart, in *Green v. Weaver*. So in the court above, p. 91, they were regarded as representing themselves to the plaintiff as authorized to act for him lawfully.

But where each party knows the other's real position in relation to the transactions in which they are engaged these principles have no application.

Where persons entered into an arrangement which they knew to be

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\* In this case, p. 432, Sir A. Hart appears to misapply cases such as *African Co. v. Parish*: *E. I. Co. v. Neave*, see *ante*, p. 338: in those cases the agreement of the party was to pay the penalty, not to give the discovery: see Hare, pp. 140—141.

prohibited by law and to render them liable to penalties they must be taken to have known that neither of them would be able to obtain discovery against the other of the matters relating to the transactions in which they were engaged, or even that it was a condition that they should not be bound to make disclosures: see *Robinson v. Kitchin*, 21 Beav. pp. 371—373, regarding *Short v. Mercier* referred to *ante*, pp. 311, 326, as such a case, (and also a similar case of *Robinson v. Lamond*, 15 Jur. 240).

In the same case on appeal, 8 D. G. M. & G. p. 91, Knight-Bruce, V. C. expresses no opinion whether an allegation that the plaintiff at any time during the course of the transaction was aware of the want of qualification in the broker would have been material; but, p. 90, he approves *Short v. Mercier*.

The dictum in *Gascoigne v. Sidswell*, Gilb. 186, that "where two go on an unlawful trade (infringing the E. I. Co.'s trade monopoly) they seem entirely to have waived that unlawfulness between themselves and so they must answer" seems hardly reconcilable with the views above.

An executor or administrator charged with fraudulently tendering an account of assets could not escape discovery on the ground of the penalties to which he was liable under his bond and oath duly to administer the assets: *Green v. Weaver*, 1 Sim. pp. 431—432. And see *ibid.* pp. 425—426, where the liability of a broker to a charge of perjury for breach of his oath, taken on being admitted broker, was held to be no protection to discovery of accounts to his principal, otherwise the oath instead of securing his honesty would serve as a screen for the commission of gross frauds: and see *Wilson v. Prince* referred to 2 Ves. p. 244: and see *Robinson v. Kitchin*, 8 D. G. M. & G. pp. 91—92: and see as to a broker's oath *Ex parte Dyster*, 1 Mer. 155. In a suit to have an award decreed and performed the defendant was protected from giving discovery so as to charge himself with the penalty of a bond for the performance of the award: *Bishop v. Bishop*, 1 Rep. in Ch. 75.

But as a general rule a defendant liable to account in equity even as a trustee can protect himself from any discovery whether by way of production of deeds or otherwise which may subject him to penal consequences, and the plaintiff must prove his liability by other means: see *Parkhurst v. Lowten*, 2 Sw. pp. 212—214, 215.

A party cannot by any agreement deprive himself of the benefit of the protection given him by law against disclosing matters which might be made the subject of a criminal

charge against him: *Lee v. Read*, 5 Beav. p. 385 : *Robinson v. Kitchen*, 21 Beav. p. 370, n.

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(g) *Not in every case of indictable Fraud, Perjury or Conspiracy—Underwriters—13 Eliz. cap. 5 : 27 Eliz. cap. 4.*

It is not in every case where the matters as to which discovery is sought might furnish ground for an indictment for fraud or perjury : see *Chadwick v. Chadwick*, 22 L. J. Ch. pp. 330, 331 : or for combination or conspiracy: *Mayor of London v. Levy*, 8 Ves. p. 403 : *Dummer v. Corporation of Chippenham*, 14 Ves. 245, pp. 249, 251 : *A. G. v. Conroy, Jones*, 791 : *A. G. v. Daly*, Hay. & J. 379, to defraud the crown of revenue: (but see *Mayor of London v. Levy* in argument, pp. 399—401 : *Oliver v. Heywood*, *Mayor of London v. Ainsley*, 1 Anst. 62, 160 : Hare, p. 143 : Redes. Pl. 40—41) : that the party will be able to withhold the discovery. If that were so Lord Eldon considered that it would be difficult to abstract from the apparent grasp of the common law doctrine of conspiracy nine-tenths of the bills in equity charging combination and conspiracy in the usual form : *Mayor of London v. Levy*, p. 403 : or not so charging it: *Dummer v. Corp. Chippenham*, p. 251 : and so where defendants are charged with fraud in equity: *Chadwick v. Chadwick*, p. 331 : and see *Brownsword v. Edwards*, 2 Ves. pp. 243—244, citing *Wilson v. Prince* : see also *Gartside v. Outram*, 3 Jur. N. S. 39.

In *Chetwynd v. Linden*, 2 Ves. 450 (conspiracy to set up a bastard child but not for the purpose of defeating the heir and therefore not an offence) Lord Hardwicke observes that it is not every conspiracy charged in a court of equity that would be a ground for a criminal prosecution, and that the boundaries are often very nice between where a matter is near indictable and a fraud in a court of equity.

See *ante*, p. 339, as to the oath of an executor, broker, &c.

Underwriters have been allowed to have discovery to support charges of fraud amounting to an indictable offence in aid of their defence to actions on policies : see *Macaulay v.*

*Shakell*, 1 Bligh, N. S. pp. 121—122, 133 : *The Mary*, L. R. 2 A. & E. p. 324 : but they have always been specially favoured in the matter of discovery : see *post*, Bk. III. Ch. II.

The provisions of 13 Eliz. cap. 5, section 3, and 27 Eliz. cap. 4, section 3, imposing penalties and forfeitures on parties to fraudulent and voluntary conveyances, could not it was held be used to prevent discovery : *Bunn v. Bunn*, 4 D. G. J. & S. 316.

The point was also touched upon in *Wich v. Parker*, 22 Beav. 59. In *Bunn v. Bunn* the discovery required was an affidavit of documents (qu. whether in any case objection can be taken to making the affidavit, see *ante*, p. 315), and the objection was that making the affidavit involved an admission of the possession and existence of the deed which was sought to be impeached in the action, and that if successfully impeached the defendant would be liable to penalties under section 3 of 13 Eliz. c. 5, on which the court observed that the penalties did not attach if the deed was defended honestly and justly (as to which see also *Mexican, &c. Co.*, *ante*, p. 326). It may be noted that it was also said that any objection to the production of any particular document could be considered on its merits afterwards. Qu. whether it was meant that any objection of the same kind could then be raised.

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Where a party objected to produce documents on the ground that they tended to support an indictment then pending against him for perjury committed in the suit production was ordered on the ground that if it were allowed to constitute a valid objection it would hold out an inducement to a party to commit perjury at an early stage of the action in order to prevent the court from administering justice in the suit : *Rice v. Gordon*, 13 Sim. 580.

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#### VI. *Discovery tending to discredit a Party or render him Infamous.*

A party cannot escape the obligation of giving discovery on the ground that it would tend to render him infamous, where it does not amount to a public offence or an indictable crime : see *Chetwynd v. Linden*, 2 Ves. p. 450 : Story, Eq. Pl. 596 : or subject him to penal consequences : Wigr. Pl. 271 : Dan. Ch. Pr. p. 483.

In *Parkhurst v. Lowten*, 1 Mer. p. 400, Lord Eldon held that where the time for enforcing a penalty or forfeiture has expired discovery could not be refused although it might tend to cast a very great deal of reflection on his character and conduct. And see Hare, p. 132. So where a crime has been pardoned, discovery cannot be withheld, see *ante*, p. 331.

In old times acts of infamy or turpitude (adultery for instance) subjected a person to censure or punishment by the Ecclesiastical Courts; and this was considered to be punishment according to the law of the land. Discovery therefore of such matters was protected: *Brounsword v. Edwards*, 2 Ves. p. 247: *Franco v. Bolton*, 3 Ves. p. 372; so explained in *Benyon v. Nettlefold*, 3 M. & G. p. 103; and in Hare, p. 132: *Chetwynd v. Linden*, 2 Ves. 450: *A. G. v. Duplessis*, Park, p. 163: Redes. Pl. 196.

Where discovery calculated to discredit the party is irrelevant, it is scandalous, see *ante*, p. 105.

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Where the party incurs no penalties the alleged illegality of the transaction is no defence to discovery: *Williams v. Tyre*, 18 Beav. 366: and see *Benyon v. Nettlefold*, *ante*, p. 335.

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## VII. *The position of a Trustee, Executor, Attorney, Agent, Member of Corporation, in relation to Discovery penalising the Cestui que trust, Legatee, Client, Principal Corporation.*

A party is only protected from discovering matter which will expose himself and not matter which will expose some other person (except his or her wife or husband in the case of a criminal charge: see a passage in Steph. Dig. Law Evid. referred to 10 Q. B. D. p. 113: as of felony: *Cartwright v. Green*, 8 Ves. 405: and see *ante*, p. 51, as to a married woman) to penal proceedings: *King of Two Sicilies v. Willcox*, 1 Sim. N. S. p. 329: *Parkhurst v. Lowten*, 2 Sw. pp. 211, 212, 214, 215.



The position of a trustee and an executor would seem to be as follows:—

A trustee or executor cannot withhold discovery on the ground that it may criminate a person beneficially interested in the property, or that it would have criminated the testator if he had been alive.

Nor *prima facie* can a trustee or executor having no beneficial interest in the property withhold discovery on the ground that it may cause a loss or forfeiture of that property.

But in some cases the trustee is regarded for the purpose of the action as the beneficial owner of the trust property: see *ante*, p. 202. In such a case a penalty or forfeiture affecting the trust property should it is conceived be regarded as if it affected property of which the trustee was in reality beneficial owner, and the trustee not only may but is bound to take the objection: see *Hare*, pp. 132—133. In *Suffolk v. Green*, 1 Atk. 449 the person named in a usurious bond, though admittedly only a nominee for another person not a party, was allowed to withhold discovery. Lord Hardwicke, p. 450 says "For as to the objection that the defendant Green will lose nothing by the discovery as he has no interest: a trustee has as much the benefit of the pleading of this court as he that has the equitable interest, nay the cestui que trust is entitled to have the privilege maintained by the trustee."

The position of the executor must be the same in principle as that of the trustee. Where he is for the purpose of the action regarded as representing the testator's estate it is conceived that any penalty or forfeiture affecting that estate, whether through the person of the testator or otherwise, may be treated as if it were a penalty or forfeiture affecting his own property but this in the interest of those claiming under the testator.

Where an executor has also a beneficial interest, as in *Parkhurst v. Lowten*, 1 Mer. 391, pp. 401—2, where he was also devisee, he may withhold discovery in respect of that beneficial interest.

A trustee where he is himself affected may withhold discovery from his cestui que trust: *Parkhurst v. Lowten*, 2 Sw. pp. 211, 212: 1 Mer. pp. 401.

On the principle that the protection is a purely personal one an attorney cannot refuse to discover matter which would subject his client to penal proceedings unless it involves a violation of professional confidence: *Parkhurst v. Lowten*, 2 Sw. pp. 211, 214, 216, 217.

So an agent and his principal.

It is clear that the clerk (here made a co-defendant with the company for discovery) to the defendants cannot demur on the ground that his principals are liable to penalties and his answer could not (see as to this *ante*, p. 83) be read against them: *Gibbon v. Waterloo Bridge Co.* 5 Pri. 491, p. 493.

Generally therefore where a member or officer of a corporation is required under the present practice to give discovery on its behalf no liability of the corporation constitutes any objection to his giving discovery: see *King of Two Sicilies v.*

*Willcox, post* : except of course to the extent to which he himself is affected: see for instance *MacFae v. Corp. of Liverpool, ante*, p. 320 (where the town clerk would have been personally affected by the discovery which he was called on to give). In fact it is only in exceptional cases that a corporation can be indicted, as for instance for not repairing a bridge or not complying with an order of justices: the general law of England is that a corporation cannot be indicted for a crime: *King of Two Sicilies v. Willcox*, 1 Sim. N. S. p. 334.

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#### VIII. *As to the Rule extending to Forfeiture or other Penal Proceedings in a Foreign Country.*

The rule is not confined to penal proceedings arising from a breach of or existing merely by virtue of the municipal law of this country: it extends to penal proceedings arising from a breach of the law of a foreign country: *U. S. A. v. Macrae*, L. R. 3 Ch. 79, disapproving Lord Cranworth's opinion to the contrary in *King of Two Sicilies v. Willcox*, 1 Sim. N. S. pp. 329—331.

In this case Lord Cranworth founded his opinion on the view that the judge must be able to say as a matter of law whether the matters disclosed or relied on by the party could or could not entail penal consequences, but that in respect of penal consequences in a foreign country no judge could know as matter of law what would or would not be penal in a foreign country, and therefore could not form any judgment as to the force or truth of the party's objection, and that if the principle was once admitted it must be admitted in all its ramifications. Where, as in that case, there was nothing on the face of the proceedings to inform the mind of the judge whether there was any and if any what foreign law applicable to the case or whether the parties had incurred or made themselves liable to any penalty or forfeiture by their conduct, and there was only a statement that they believed and had been advised that the production of the documents would expose and render them subject to criminal prosecution punishment and penalties in Sicily, the discovery was properly ordered, for it did not furnish the least information of what the foreign law was on the subject, though it was necessary for the judge to know this with certainty before he could say whether the parties had rendered themselves amenable to punishment by that law or not: *U. S. A. v. Macrae*, L. R. 3 Ch. pp. 84—85, approving the decision to that effect in *King of Two Sicilies v. Willcox*. In this case it may also be observed that the liability of the parties depended upon their voluntary return to Sicily: *Ibid.* p. 332: and see *U. S. A. v. Macrae*, p. 87. But where the U. S. A. government brought an action for an account of monies received by the defendant as agent of the Confederate government, and the defendant pleaded an act of Congress under which the property of persons who had acted as such agents was liable to

confiscation, and that proceedings by the plaintiffs were actually pending against him for this purpose in America, and where therefore the exact nature of the penalties or forfeiture was precisely stated, and the plaintiffs having themselves instituted proceedings against the defendants could not deny their liability, and no expert to construe the act was required, and their liability to forfeiture of their property was independent of their return to America, the plea was held good to discovery of matters relating to the alleged agency: *U. S. A. v. Macrae*, L. R. 3 Ch. 79, pp. 84—87, affirming on this point L. R. 4 Eq. 327.

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### IX. *Actions to recover Penalties or enforce Forfeitures.*

It has been held in a recent case that the plaintiff in an action to recover penalties is not entitled either to interrogate or to have discovery of documents: *Hunnings v. Williamson*, 10 Q. B. D. 459 (action to recover penalties under Metropolis Management Act, 1855, s. 54, for acting as vestryman, overruling therefore *Society of Apothecaries v. Nottingham*, W. N. 75, p. 259, an action to recover penalties under the Apothecaries Act, where interrogatories were allowed: see also *Anon.* W. N. 75, p. 219, action for penalties under Larceny Act, s. 102, by common informer). The decision was rested on the ground that equity would not before the Jud. Acts have given discovery to a plaintiff in such an action, that the case did not come within the principles upon which previously to those acts discovery was granted at law or in equity, and that (following *Lyell v. Kennedy*, see *ante*, pp. 8 and 9) where there was no right to discovery before the acts there was none now, *Fisher v. Owen* (as to which see *ante*, p. 318) dealing only with actions where the party had a right to administer interrogatories.

Some reliance seems to have been placed on a passage from a judgment of Sir A. Hart in *Green v. Weaver*, 1 Sim. p. 430, quoted in *Chadwick v. Chadwick*, 22 L. J. Ch. p. 330, and commented on *ante*, p. 324, to the effect that equity would give no discovery to aid the recovery of a penalty.

The author has been unable to find any case in which discovery was sought in equity for the express purpose of aiding the prosecution of an action to recover penalties or enforce a forfeiture and was refused on that express ground. (See as to discovery in aid of an action for felony: *Cartwright v. Green*, *ante*, p. 324: and as to discovery in aid of actions for tort: *post*, Sect. X.) In every case the ground on which discovery is refused is that based on the maxim "Nemo tenetur seipsum prodere." And so it is put in *Redes.* Pl. 194: *Beames*, Eq. Pl. 268: and see *ante*, p. 322: and not on any peculiar reluctance of equity to assist penalties or forfeitures. Mr. Hare, in *Hare*, p. 137, expressly distinguishes between the rule that a party is not bound to answer so as to expose himself to pains penalties or forfeitures from

the principle that equity only assumes a jurisdiction to compel discovery in a civil action, the objection not being to the whole bill or proceeding as seeking discovery at all, but to the individual questions put. Mr. Justice Story in Eq. Pl. § 521, lays it down that it is a universal rule in courts of equity not to lend their aid to enforce any penalty or forfeiture; and so in Story, Eq. Jur. § 1509, that a bill of discovery will not lie in cases which involve penalties or forfeitures of a public nature nor those of a private nature unless waived; and see *ibid.* §§ 1319, 1494. But the authorities which he quotes in support are all cases of the kind above, where that is to say the ground of objection is not the purpose for which the discovery is sought but the effect of giving the discovery. It probably is so that equity would not have granted discovery in aid of the prosecution of such actions, partly perhaps on the ground that it was the business of equity to relieve against and not to assist forfeitures: see Fonbl. Eq. bk. vi. ch. iii. § 5: *A. G. v. Hindley*, 1 Eq. Ca. Ab. 131: and 1 Eq. Ca. Ab. 131, para. 9: but both text writers and judges seem to have relied in support of this proposition upon cases which were decided on totally different grounds.

There were four cases at common law under the C. L. P. Acts where application was made by the plaintiff for leave to administer interrogatories in actions of ejectment founded on forfeiture.

In *May v. Hawkins*, 11 Exch. 210 (ejectment for breach of covenant to insure) the application was refused on a technical ground, the judges however strongly disapproving such an application. In *Chester v. Wortley*, 17 C. B. 410 (ejectment for breach of covenants in lease) leave was granted, it being considered that the proper time to object was on putting in the answer, the grounds of objection to be then stated to each question, following *Osborn v. London Dock Co.*, a different case, see *ante*, p. 320. In *Blyth v. L'Estrange*, 3 F. & F. 154 (ejectment on forfeiture against copyhold tenant) leave was refused. In *Pye v. Butterfield*, 5 B. & S. 829: 34 L. J. Q. B. 19 (ejectment on forfeiture for underletting) after an elaborate argument leave was refused on the ground (p. 837) that a bill of discovery would not have been allowed in equity where the answers might have the effect of causing a forfeiture of an estate: and see *Cork v. Potter*, 11 C. L. 94: *Browne v. Davies*, 2 L. R. Ir. 434.

It may be noted that though equity refused to give discovery in aid of the prosecution of an action for personal tort the common law courts under the C. L. P. Acts were in the habit of doing so: see *post*, Section X.

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## X. Actions for Tort.\*

In early times there was some doubt as to the extent to which a court of equity would interfere to give discovery in

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\* Considered here for convenience, see *ante*, p. 4.

aid either of the prosecution of or the defence to actions for tort. The equity practice is discussed *post*, p. 348.

Under the powers conferred upon them by the C. L. P. Acts the common law judges considered that they were authorized to grant discovery in actions for tort both to the plaintiff and defendant, though they admitted that in equity a bill of discovery could not be filed in aid of the prosecution of an action for personal tort: *Pye v. Butterfield*, 34 L. J. Q. B. pp. 19, 20: 5 B. & S. pp. 837—839. In numerous actions, chiefly actions for slander or libel, this jurisdiction was exercised in favour of either party, but as a matter purely for the court's discretion: see libel cases cited *ante*, pp. 319—320: slander cases (interrogatories by plaintiff), *post*, p. 463: *Gourley v. Plimsoll* (interrogatories by defendant in action for libel), *post*, p. 463: *Metropolitan, &c. Co. v. Hawkins* (inspection by defendant in action for libel), *post*, p. 463: see also *Macaulay v. Shakell*, *post*, p. 348.

Now although generally the equity practice of discovery has since the Jud. Act superseded the common law practice of discovery: see *ante*, pp. 5, 7: the rights which existed under the C. L. P. Acts to discovery in aid both of the prosecution of and defence to actions for personal tort have not been destroyed by the Jud. Acts and Rules but still remain: see *ante*, pp. 8, 9. But the exercise of these rights in such actions is governed by or modelled upon the equity practice of discovery generally, just as all discovery of a criminatory character is now regulated by that practice: that is to say, the common law discretion to disallow the interrogatories is gone; if they are relevant they must be allowed (see as to the effect of the new rule necessitating the leave of the court to interrogate, *ante*, p. 91) and the objection to them as being of a criminatory character must be taken on oath in the answer, though it may be a case where a plaintiff is seeking discovery in an action for libel, and where almost of necessity the discovery, if relevant, must be such as tends to prove the libel and is therefore as a rule (but see *McLoughlin v. Dwyer* and *Collins v. Yates* cited *ante*, pp. 319, 320) criminatory: and so as to discovery and production of documents: see *Lamb v.*

*Munster*, ante, p. 328 : *Webb v. East*, ante, p. 315 : *Atherley v. Harrey* disapproved, ante, p. 318 : *Dalrymple v. Leslie*, ante, p. 131 : (see also *Hill v. Campbell*, ante, p. 320) : *Allhusen v. Labouchere* (interrogatories by defendant), ante, p. 317 : and generally, ante, p. 317.

The equity practice :—(see *ante* as to the common law practice.

(a) As to actions for tort to property.

Discovery (and even relief) seems frequently to have been granted in equity in aid of the prosecution of actions for tort to property, especially where by the secret contrivance of it, it could not be proved : Fonbl. Eq. bk. 6, ch. 3, § 5 : such as trespass : *E. I. Co. v. Sandys*, 1 Vern. 129 : and see *Cage v. Warner*, 1 Eq. Ca. Ab. 76 : Hard. 182 : as where a man carried his mine under his neighbour's ground : *E. I. Co. v. Evans*, 1 Vern. p. 309 : *Taylor v. Crompton*, Bun. 95 ; or trover, as where a man ran away with a casket of jewels : *E. I. Co. v. Evans* : and see *Sloman v. Heathfield*, Bun. 18 : *Macclesfield v. Davis*, 3 V. & B. 16. In *Heathcote v. Fleet* : *Morse v. Buckworth*, 2 Vern. 442 : bills of discovery in aid of actions for damages were allowed on the express ground that the damages arose out of a contract or undertaking.

It is a mistake to say a man shall not have discovery in this court for matters that sound in tort : *E. I. Co. v. Evans*, p. 307.

“It was next argued that a court of equity would not lend its aid either for discovery or commission to either party in an action at law proceeding *ex delicto*. I cannot but consider the cases of *Cojamaul v. Verelst* and *Nicoll v. Verelst*, 4 B. P. C. pp. 407 and 426, as being some authority the other way. It did not occur to the very distinguished counsel who were employed in those cases that any such point could be sustained. No such limitation of the jurisdiction as to discovery is hinted at in any book of practice or by the dictum of any judge. . . . I am not therefore prepared to say that a court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy : Sir John Leach in *Thorpe v. Macaulay*; 5 Madd. p. 230.

(b) As to actions for personal tort (the equity practice, see *ante*).

The right of a defendant in an action for personal tort to discovery seems never to have been the subject of an actual decision in equity, though it was discussed in *Macaulay v. Shakell*, before the House of Lords : 1 Bligh, N. S. 96. This case is treated in *Wilmot v. Maccabe*, 4 Sim. p. 266 (and see *Steward v. Nugent*, 1 Keen, p. 203) as having actually decided that a bill of discovery might be filed in aid of the defence to a civil action for personal tort, or at all events in aid of the defence to a civil action for libel. This however is not so. This case seems also to have been misunderstood by Mr. Hare : see Hare, pp. 117—118 : and see *Hill v. Campbell*, L. R. 10 C. P. p. 247 : note to Story, Eq. Jur. § 1494 : and Story, Eq. Pl. 597. The suit was brought by the defendant to a civil action for libel for discovery an injunction and a commission to examine witnesses : and the ground taken by the plaintiff in resisting it was that, the publication of the libel being an indictable offence, the defendant was not entitled to the assistance of a court of equity, his case being founded upon and arising out of the commission by him of such indictable offence, and that therefore by his own showing he had come to protect

himself against the consequence of his crime, and there was no precedent for such a bill in aid of a plea to an action for libel averring the truth of the libel. And this also was the question which the House of Lords considered to be before them, that is to say whether a defendant in such an action could bring a bill in a court of equity to prove the truth of the libel (see pp. 123, 126, 135) or whether a court of equity ought not to interfere at all (see p. 126). The actual decision (see pp. 116, 129), following in fact *Cojamaul v. Verelst* and *Nicol v. Verelst*, 4 B. P. C. 406, 416, suits in aid of the defence to civil actions for malicious arrest and imprisonment, was that the defendant was entitled to a commission, and the demurrer being to the whole bill was therefore overruled. The proposition contended for by Lord Eldon was (see pp. 126—127) that, if a plaintiff having an option either to prosecute the defendant for an indictable offence or proceed against him civilly thinks proper to go into a court of law for a recompense in matter of damages, that makes it a civil action, and the defendant has as good a right to pursue his defence to it as a civil proceeding as the plaintiff, even (p. 128) if it be to assist a plea of justification (see also the equity cases of *Wilmot v. Maccabe*, 4 Sim. p. 266, and *Stewart v. Nugent*, 1 Keen, 201 : and the common law cases of *Metropolitan, &c. Co. v. Hawkins* and *Gourley v. Plimsoll*, *post*, p. 463). But this proposition was not absolutely laid down in its integrity so as to cover a bill for discovery. At the same time it is not conceived that it was intended to be suggested that the plaintiff in the action should be deprived of the right which he would have in any action to object to give any particular discovery on the ground of its criminatory character. A plaintiff even in equity is under no greater obligation in this respect than a defendant : see Story, Eq. Pl. § 597 : *Bishop of London v. Fytche*, 1 B. P. C. 96 : *Honeywood v. Selwyn*, 3 Atk. p. 276 : *Southall v. —*, Y. 308 : see however extracts from *Wildbore v. Parker*, referred to *ante*, p. 334. See also generally as to the position of a plaintiff in regard to discovery, *post*, pp. 458, 467.

In *Thorpe v. Macaulay*, 5 Mad. 218, a suit of a similar character to *Macaulay v. Shakell*, the same ground was taken in argument, the same views put forward by Sir John Leach, p. 231, and the demurrer overruled on the same grounds, leave however being given to file a separate demurrer to the discovery on the ground that the whole object of the discovery being (p. 229) to prove the truth of the libel, in other words to prove the truth of the criminal matter charged, it was demurrable (see *ante*, p. 318).

There is no instance to be found of any bill in equity having been filed in aid of the prosecution of an action to recover damages for personal tort. And Lord Langdale in *Glyn v. Houston*, 1 Keen, p. 337, in reference to this fact says, "I have looked into the authorities which tend very much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. If it were expressly necessary to decide the point I think it clear what the course of my duty would be." And then he goes on to say that the bill being one of which the whole object was to have discovery of matter on which a criminal charge might be founded (illegal assault and imprisonment) it could not be sustained.



## CHAPTER II.

### LEGAL PROFESSIONAL PRIVILEGE.



#### PART I.

GENERALLY AS TO THE DOCTRINE OF LEGAL PROFESSIONAL PRIVILEGE INDEPENDENTLY OF THE FACT WHETHER (see *post*, p. 358) THE DISCOVERY IS SOUGHT OF THE CLIENT OR OF THE LEGAL ADVISER.

##### I. *The Doctrine.*

The object meaning and general scope of the doctrine is clearly set forth in the following passages:—

“As by reason of the complexity and difficulty of our law litigation can only be properly conducted by professional men, it is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim should have recourse to the existence of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim or the substantiating his defence against the claims of others: that he should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation”: Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 649.

In *Woods v. Woods*, 4 Ha. p. 85 Wigram, V. C. expressed his opinion that so long as the state of the law should make it impossible for parties to be their own lawyers and to act without professional advice it was indispensably necessary that the privilege conceded to professional communications should be maintained at least to the extent to which it was then established.

“The unrestricted communication between parties and their professional advisers has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth cannot be ascertained”: Lord Langdale in *Reece v. Trye*, 9 Beav. p. 319. (It may be observed that Lord Langdale viewed the privilege with disfavour in some respects, see *post*, p. 370: and *Flight v. Robinson*, 8 Beav. p. 34: and *Storey v. Lennox*, 1 Keen, pp. 349—350.)

“The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the

privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute I do not think this occasional benefit justifies us in incurring the attendant risk": Cockburn, C. J. in *Southwark Water Co. v. Quick*, 3 Q. B. D. p. 317.

"The protection is of a very limited character and is restricted in this country to obtaining the assistance of lawyers as regards the conduct of litigation on the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently": Jessel, M. R. in *Wheeler v. Le Marchant*, 17 Ch. D. pp. 681—682.

"The rule which protects from disclosure confidential communications between solicitor and client does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases in which at least equal confidence is reposed: in the cases for instance of the medical adviser and patient, and of the clergyman and prisoner. It seems to rest not upon the confidence itself but upon the necessity of carrying it out. Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. p. 103, gives I think the true foundation of it. He says, 'It is founded on a regard to the interests of justice which cannot be upholden and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all every one would be thrown upon his own legal resources: deprived of all professional assistance a man would not venture to consult any skilful person or would only dare to tell his counsellor half his case.' This then being the foundation of the rule the court when called on to apply it must of course have regard to the foundation on which it rests and not extend it to cases which do not fall within the mischief it was designed to prevent": Turner, V. C. in *Russell v. Jackson*, 9 Ha. p. 391: and see Truro, L. C. in *Glyn v. Caulfield*, 3 M. & G. pp. 474—475: Knight Bruce, V. C. in *Pearse v. Pearse*, 1 D. G. & Sm. pp. 28—29: Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. p. 404: Lord Blackburn, *ibid.* 9 App. Ca. 86: Lord Brougham in *Bolton v. Corp. of Liverpool*, 1 M. & K. p. 94: and *Lyell v. Kennedy*, cited *post*, p. 393.

The exercise of the privilege is not to be allowed to prejudice the client.

In *Wentworth v. Lloyd*, 10 H. L. C. 589, the Master of the Rolls had laid it down that where a client (the plaintiff) chose to exercise his privilege to prevent his solicitor as witness from divulging confidential communications he must be subject to the rule that the keeping back of evidence must be taken most strongly against the person who does so. Lord Chelmsford protested strongly against any such proposition as (p. 590) being entirely at variance with principle and utterly in contradiction to the privilege of professional confidence, and as (p. 592) denying him the protection afforded him by the law for public purposes, and taking away a privilege which could thus only be asserted to his prejudice.

And the same considerations seem applicable to the case where discovery is sought from the client himself.

II. *Exceptions to the Privilege—Fraud—Illegal Purpose—Criminal Matter—See also other cases of non-existence of the Privilege, post, Part III. Sect. I.*

When a solicitor is party (with his client) to a fraud no privilege attaches to the communications with him upon the subject because the contriving of a fraud is no part of his duty as solicitor: *Russell v. Jackson*, 9 Ha. p. 392.

It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together as cases of exception to the general rule. They are cases not coming within the rule itself; for the rule does not apply to all which passes between a client and his solicitor, but only to that which passes between them in professional confidence; and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor: *Follett v. Jefferys*, 1 Sim. N. S. p. 17: and so *Charlton v. Coombes*, 4 Giff. p. 380: and see *Bowles v. Stewart*, 1 Sch. & Lef. 229.

There is no difference it seems whether the disclosure be sought from the client or the solicitor: see *Follett v. Jefferys*, 1 Sim. N. S. p. 16: and cases cited *post*, p. 353 to p. 355.

Nor whether the disclosure sought be of the contents of documents or by way of actual production: *Follett v. Jefferys*, p. 15: *ibid.* 13 Jur. 973, 465. But in the absence of the client the solicitor could not be ordered by way of discovery to produce documents the property of the client: see *post*, p. 429, and *ante*, p. 199.

The cases where discovery has been had from a solicitor made a party for the purpose of costs are considered *ante*, pp. 49, 55.

See also *Gresley v. Mousley*, 3 K. & J. 288, referred to *post*, p. 386, where persons claiming under the client impeached a purchase by the solicitor from the client, a case however which obviously involves different considerations.

There are three requisites necessary to oust the privilege on this ground, (a) there must be a fraud, (b) the discovery must be connected with the fraudulent acts, (c) the legal

adviser must be a party or quasi-party to the fraud (but see as to a crime as opposed to a civil fraud *post*, p. 355).

(a) There must be a fraud.

For what constitutes fraud for this purpose: see *Follett v. Jefferys*, 1 Sim. N. S. pp. 15—16: *Reumell v. Sprue*, 1 D. G. M. & G. pp. 685—686: *Marshall*

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353. *After heading (c).*

The privilege is lost even if the legal adviser is not a party to the contemplated fraud or crime and is ignorant of the purpose for which his advice is wanted, for the protection of such communications must be injurious to the interests of justice: *R. v. Cox and Railton*, 14 Q. B. D. 153, reviewing all the cases and disapproving *Cromack v. Heathcote*, *R. v. Smith*, *Doe v. Harris*, all cited *post*, pp. 354—356, and approving in particular Turner, V.-C. in *Russell v. Jackson*, *post*, p. 355.

See *ibid.*, at pp. 175, 176, with reference to the note on p. 353.

a conveyance made from the defendant to his solicitor (co-defendant) pending another suit, letters relating to this other suit were protected, though otherwise if it had appeared that they related to the preparation of the deed, the solicitor being charged to be a party to the fraud. In this case production was ultimately ordered of the documents, see *post*, p. 425, and they were read in evidence, 19 L. J. Ch. 425.

(c) The legal adviser must be a party or quasi-party to the fraud (but see as to a crime as opposed to a civil fraud *post*, p. 355): see the passages cited *ante*, p. 352: *Greenough v. Gaskell*, 1 M. & K. p. 109: *Duffin v. Smith*, Peake, 108.

All the authorities are clear on this point: the opinion therefore of Malins, V. C. in *Phillips v. Holmer*, 15 W. R. 578, p. 579, that where parties were

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\* The recent case of *R. v. Cox and Railton* (June 20th and 27th—the judgment in which has not yet been delivered) seems to bear upon this point, for a question was raised in argument whether some independent evidence of the fact that the communication was for a criminal purpose must not have been given in order to justify the court in calling on a solicitor as witness to disclose the matter or purpose of the communication.

charged with fraud they could not claim privilege for any communications whether opinions of counsel or letters by or to them relating to those opinions (and see also his argument as counsel in *Charlton v. Coombes*, 4 Giff. p. 378, to the effect that the fraud of the client without any participation of the solicitor takes the case out of the rule) cannot be upheld. The decision in this case may perhaps be supported on other grounds: it was an application by next of kin against executors and the documents related to an administration suit which the next of kin were seeking to stay on the ground of fraud, see *post*, p. 386.

The solicitor must be acting *particeps criminis* and not in the true relation of solicitor and client: see *Reynell v. Sprye*, 11 Beav. 618.

It is not enough that the client committed a fraud, but in order to take the case out of the privilege there must be some specific charge in the bill connecting the solicitor with the fraud: *Charlton v. Coombes*, 4 Giff. p. 381: and see *Follett v. Jefferys*, 1 Sim. N. S. pp. 15—16.

There can be no doubt that if a solicitor is a co-conspirator (see also *Greenough v. Gaskell*, p. 109) with a defendant in the cause in concocting a fraud in respect of which the suit seeks relief the privilege does not cover such a case: *Charlton v. Coombes*, 4 Giff. p. 380, where there was no single passage in the bill charging the solicitor (witness) with the fraud or with any fraud: he was employed in the ordinary way: p. 381. *Follett v. Jefferys* was the exact reverse: there was a charge that the defendant and solicitor took counsel together, &c. (to make a deed), but the alleged circumstances were held not to amount to fraud.

So in *Mornington v. Mornington*, 2 J. & H. 697, pp. 702—703, communications between the defendant and her solicitor in the course of the preparation of a deed which it was being sought to set aside as fraudulent were held to be covered by privilege on the ground that it was not averred that the solicitor took any part in the fraudulent proceeding, all that was alleged with respect to him being that he was instructed to and did prepare the deed, the fraud charged being collateral to the communication with the solicitor, and there was therefore nothing to bring it within the rule that where a fraud is concocted between the client and solicitor the communication by which it is effected must be produced.

See also *Anon. Skinner*, 404, referred to in *Greenough v. Gaskell*, 1 M. & K. p. 105, where the attorney who drew an alleged corrupt agreement was not allowed to be examined as to the matter of it: *Cromack v. Heathcote*, 2 Brod. & B. 4, where the attorney who had been applied to by the defendant to draw an assignment alleged to be in fraud of his creditors and on that ground had refused to draw it was protected from giving evidence: *Shellard v. Harris*, 5 C. & P. 592, where an attorney as witness was protected (the question in the action being whether a deed from an insolvent to the defendant was *bonâ fide* or fraudulent) from answering whether the insolvent had not applied to him to draw a conveyance in fraud of his creditors, and also whether he asked his advice for a lawful or unlawful purpose, for, p. 594, it might be that he asked whether a particular thing could legally be done (see *R. v. Cox*, *post*, p. 355): *Chant v. Brown*, 9 Ha. 79, a suit to impeach an appointment as fraudulent, where the attorney who drew it was allowed to claim privilege.

On the other hand in *Reynell v. Sprye*, 10 Beav. pp. 56—57, it was said that the letter was not written in professional confidence for the purpose of obtaining professional assistance but that the client having a particular purpose in view made the attorney his tool and not his adviser. In this case the client had penned a letter to be copied and sent to him by his attorney as if emanating from the attorney himself for the purpose of showing it to the plaintiff in order to induce him to sell a certain estate: in a suit to set aside the sale on the ground of fraud production was ordered on the client and the solicitor, defendants, of the letter admitted to be in their possession, and on the solicitor of the draft and of another similar letter in his possession, but not of the correspondence between them.

Where a solicitor (defendant) was alleged to have been party to a fraud by

which his client (deceased) forged a signature to a will impeached in the suit he was ordered to produce all papers which might throw a light on the transaction (except a draft bill in a contemplated suit as being equivalent to an opinion of counsel) whether his own or belonging to his client, there being no personal representative of the client who could be brought before the court (as to this last point see *ante*, p. 201): *Feaver v. Williams*, 11 Jur. N. S. 962.

Where a bill charged suppression of a will and prayed a discovery, and one of the defendants demurred, all his knowledge being derived as counsel, his demurrer was overruled, for the trust of counsel did not extend to the suppression of a will or deed: *Rothwell v. King*, 2 Sw. 221 n: see also *post*, p. 427 as to this case.

Where an attorney prepared a usurious deed he was compelled as witness to prove that the consideration was usurious, for where the attorney himself is as it were a party to the original transaction that does not come to his knowledge as attorney: *Duffin v. Smith*, Peake, 108: or, as explained by Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. p. 109, he was deemed to be the party acting rather than the attorney entrusted. A rather wider ground for disallowing privilege in the case of the attorney seems to be suggested here: and see *Greenough v. Gaskell*, pp. 103—104: namely that the matter does not come or does not come solely to his knowledge as attorney: as to this point see *post*, p. 430. So in an Irish case, *Kelly v. Jackson*, 13 Ir. Eq. Rep. 129, the solicitor (defendant) charged to be party to a fraud, and held by his form of pleading to have admitted it, was held bound to answer interrogatories asking whether he was a party to the fraud and as to preparing and submitting a case to counsel and whose it was, for, p. 140, the discovery sought was as to his own fraudulent acts and not as to anything communicated by his client.

In *Russell v. Jackson*, 9 Ha. pp. 392—393 it was suggested by Turner, V. C. that the privilege would not attach to communications for the purpose of carrying out an illegal purpose such as a secret illegal trust: and see *ante*, p. 335 as to communications relating to a secret trust. But it may be doubted whether another suggestion of the Vice Chancellor, p. 392, in that case is not too sweeping, namely that privilege would fail to attach where the solicitor was advising his client as to the means of evading the law on the ground that it was just as little a part of a solicitor's duty as the contriving of a fraud: but see *post*, as to a criminal act.

Where the case is not one of private fraud but a criminal act the privilege may fail though the attorney is not in any sense a party to it (certainly on a criminal prosecution of the client therefor, and qu. whether not also in a civil suit, see *post*); unless the communication be one made for the purpose of the client's defence to the prosecution, in which case of course it is protected: see *Phill. Evid.* p. 118.

In *R. v. Cox and Railton* (see *ante*, p. 353), a prosecution for conspiracy to commit a fraud, it was held that the attorney's evidence, to the effect that

the defendants consulted him how they might commit the fraud, and whether a bill of sale would be valid, was rightly admitted.

See also a question put in *Shellard v. Harris*, *ante*, p. 354.

See also *Russell v. Jackson*, *ante*.

The following passage from the argument in *Annesley v. Anglesea*, 17 How. State Trials, p. 1229 (and see also pp. 1241—1242), is directed to this point, and see also Tayl. Evid. p. 788. "If he is employed as an attorney in any unlawful or wicked act which came to his knowledge as attorney his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of society to destroy the public welfare." This passage is quoted with approval by Lord Hatherley in *Gartside v. Outram*, 26 L. J. Ch. p. 115: the decision however in *Annesley v. Anglesea*, rested on the ground that the communication by the client to the solicitor (to the effect that he would give a large sum to have the prisoner hanged) was not necessary for the carrying on of the legal business, as to which point see *post*, p. 441.

An admission by a party to his solicitor that he had been guilty of a matrimonial offence was held privileged in proceedings (the Queen's proctor intervening) in the Divorce Court as being civil proceedings: *Branford v. Branford*, 4 P. D. 72.

In Phill. Evid. pp. 118—123, the learned author discusses the question how far in criminal cases the attorney must disclose information or documents in his possession obtained by him without reference to the prisoner's defence. And the conclusion which he supports but admits to be doubtful (and see Tayl. Evid. 781: *Taylor v. Sheppard*, 1 Y. & C. p. 282: but see *R. v. Dixon*, 3 Burr. 1687\*: where privilege was allowed) is that where the information or document has been disclosed or entrusted to him in professional confidence the privilege obtains; but see *R. v. Brown*, 9 Cox, 281: and *R. v. Cox and Railton*, *ante*. The following cases are referred to in connection with this question: *R. v. Avery*, 8 C. & P. 596: *R. v. Farley*, 2 C. & K. 313: *R. v. Hayward*, *ibid.* 234: and *R. v. Hawkins*, *ibid.* 823 (all cited *post*, pp. 377, 440, but not turning on the point): *R. v. Tilney*, 18 L. J. Mag. Ca. 36: *R. v. Smith*. They were prosecutions for forgery and the question was whether the attorney to whom the prisoner had shown or entrusted the forged document should be permitted to give evidence to that effect or produce it. In *R. v. Tilney*, p. 38, Wilde, C. J. said in reference to a suggestion of Denman, C. J. that if a forged and false instrument were given to an attorney he should take it to the magistrate, "I apprehend the magistrate would not receive it": *R. v. Smith* is reported in Phill. Evid. p. 119, and supports the author's conclusion: and though disapproved by Patteson, J. in *R. v. Avery* was ultimately approved by the same judge in *R. v. Tilney*.

### III. *The Persons within the Privilege.*

The privilege covers any legal professional adviser: whether counsel: *Rothwell v. King* *Spencer v. Luttrell* and

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\* In *R. v. Dixon* the documents in question were vouchers produced by the plaintiff in chambers and returned to his attorney; and the court refused to order the attorney to produce them under a subp. duc. tec. at the trial of the plaintiff for forgery considering them as documents communicated to him in confidence and that on being served with the subp. he ought to have delivered them up to his client, see *ante*, p. 44, as to this.



*Stanhope v. Nott*, 2 Sw. 221, n. : *Waldron v. Ward*, Styl. 449 : including conveyancing counsel : *Knight v. Waterford*, 2 Y. & C. p. 39 : Phillips, Evid. I. p. 110 : though a merely licensed conveyancer seems in early times to have been excluded : *Vailliant v. Dodemead*, 2 Atk. p. 524 : *Turquand v. Wilson*, 2 M. & W. p. 100 : Phillips, Evid. I. p. 110 : or attorney or solicitor : *Duffin v. Smith*, 1 Peake, 146 : *Fountain v. Young*, 5 Esp. 113 : *Cromach v. Heathcote*, 2 Brod. & B. 4 : *Wilson v. Rastall*, 4 T. R. p. 758 : *Anon. Skinner*, 404 : and see generally Phillips, Evid. I. pp. 106—107 : *Anon. Skinner* : and *Cutts v. Pickering*, 1 Ventris, 197 (see *ante*, p. 306, and *post*, p. 376, as to a scrivener) : also the clerk (acting as such) of the attorney or solicitor : *Chant v. Brown*, 9 Ha. p. 794 : *Studdy v. Sanders*, 2 D. & R. 347 : *Taylor v. Foster*, 2 C. & P. 195 : *Mills v. Oddy*, 6 C. & P. p. 731 : *R. v. Upper Bodington*, 8 D. & R. p. 732 : *Boicman v. Norton*, 5 C. & P. 177 : or of a barrister : *Fbote v. Haynes*, 1 C. & P. 545 : Taylor, Evid. I. p. 774 : generally any legal agent : *Lyell v. Kennedy*, 9 App. Cas. p. 86.

But no other person : not an unprofessional agent : *Kerr v. Gillespie*, 7 Beav. 572 : *Slade v. Tucker*, 14 Ch. D. p. 827 : unless acting as agent for the solicitor under the circumstances discussed *post*, p. 401 : and see *Parkins v. Hawkshaw*, 2 Stark. 239 : *Slade v. Tucker* : not a poursuivant of the Herald's College : *Slade v. Tucker* : not the various other persons standing in some confidential relationship referred to *ante*, p. 302.

It covers a person consulted under the mistaken impression that he was an attorney, whether having ceased to practise, or not having taken out a certificate being qualified to do so : *Calley v. Richards*, 19 Beav. p. 404, disapproving *Fountain v. Young*, 6 Esp. 113 : and see Phill. Evid. I. p. 107.



## PART II.

## THE CLIENT.

The considerations applicable to the subject differ materially according as the client or the professional legal adviser is the person of whom the discovery is required. But although this is so, many of the cases discussed in Part III. in connection with the position of the professional legal adviser have a very considerable bearing on questions affecting the extent of the privilege which can be claimed by the client.

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I. *The Privilege attaching to the Client's knowledge information and belief where derived from or contained in Privileged Communications.*

The professional adviser is not bound (or even permitted, see *post*, p. 425) to discover his knowledge information or belief on the matters in question where such knowledge information or belief has been derived from privileged communications.

No such general proposition can be affirmed with respect to the client.

The client is bound to discover all he knows believes and thinks respecting his case: *Greenough v. Gaskell*, 1 M. & K. p. 101. He is protected no doubt from discovering what it was that he said or wrote to his professional adviser, or what it was that his professional adviser said or wrote to him, or what it was that he or any one else said or wrote under privileged circumstances.

Further he cannot protect himself from answering an interrogatory inquiring into his knowledge information and belief on any matter merely because he has communicated it to his professional adviser. "You can of course extract from the client everything that he knows: the circumstance that he has communicated it to his solicitor is not a reason for refusing this kind of discovery": Kindersley, V. C. in *Manser v. Dix*, 1 K. & J. p. 454. "A party liable to give discovery

at the suit of another cannot by communicating the matter of such discovery to his solicitor for the purpose of getting advice on the ground of that communication only excuse himself from giving the discovery which otherwise he would have been bound to give": Wigram, V. C. in *Chant v. Brown*, 7 Ha. p. 86.

The question is how far he can avoid such disclosure where the sole knowledge information and belief which he possesses thereon has been derived from privileged communications from his professional adviser to himself or from any person to himself or to his professional adviser. The point was discussed in a recent case of *Kennedy v. Lyell*, 23 Ch. D. 387: 9 App. Ca. 81: and also in *Lyell v. Kennedy*, *post*, p. 362. The case is cited at some length as the point is one of some difficulty and it is the only decision directly bearing on it. Other cases are referred to *post*, p. 363, as having an indirect bearing on it. See also *Pavitt v. North Metropolitan, &c. Co.* and *Gort v. Rowney*, *post*, p. 364.

L. brought an action against K. to recover possession of real estates formerly belonging to A. D. who had died intestate, L.'s title being under a conveyance from persons alleged to be co-heiresses of A. D.: K. brought an action against L. for penalties under 32 Hen. 8, c. 9, on the ground that he had bought a pretended title. In this second action L. interrogated K. to the following effect: (3) Whether it was not true according to the best of his knowledge information and belief that one of the co-heiresses was at a certain date and during a certain period a married woman, whether he or his agents had any and what knowledge or information of such matters and whether he believed such information to be true: (31) Whether he had not caused searches and inquiries to be made as to certain matters (being details of the defendant's pedigree as alleged in his defence), and whether and when and what information he had received thereon, and whether he believed it to be true, and to set forth a full account of such matters according to the best of his knowledge information and belief. K. objected to answer (3) as being irrelevant and not *bonâ fide*, and as to (31) he said, "such of the searches and inquiries referred to as were actually made by me were made and prosecuted by my solicitors or confidential agents instructed by them and were made and prosecuted for the purposes of and with a view to the defence of my title against such claims (being certain claims to the property made against him) and for the purpose of obtaining legal advice in contemplation of litigation in respect of the property," and under the circumstances objected to answer further. He was ordered to put in a further answer to (3) as being clearly material for the purpose of meeting the Statute of Limitations raised by the plaintiff, and to (31) except as to the sources of information, (or, according to Baggallay, L. J. p. 398, the answer was held sufficient as regards the searches and inquiries but insufficient as not meeting the various other questions of fact or partly of fact and law), Jessel, M. R. saying (see as to this *post*, Ch. III. Pt. III.) that he was bound to answer as to the nature of his possession, as to the pedigree so far as he knew it, and as to the representations which he had made to other people,

everything in fact which would tend to show that the defendant's title was a good title and not a pretence title. K. put in a further answer to (3) and (31) to the following effect:—"A. D. died at B. on the 5th November 1867 without ever having been married and I believe that she was the daughter of D. D. Except as aforesaid I have no personal knowledge of any of the matters inquired after. Such information as I have received in respect of the said matters other than as aforesaid has been derived by me from information procured by my solicitors or their agents in and for the purpose of defending my title to the property," and objected to answer further.

On pp. 403—403, Cotton, L. J. points out what was the real question for their decision: not that is to say whether if the reports or verbal communications of the result of the solicitor's inquiries had been handed or made to the plaintiff by the solicitor they would have been protected, for it was admitted that they would have been protected (as to this see *post*, p. 395), but whether the plaintiff could be required to answer as to facts which he knew only from those reports or communications.\* So Lord Selborne is reported, at p. 401, to have put the point on another occasion: "You cannot require him to put into the hands of his adversary anything which is in the nature of a privileged communication, but the question is whether you may or may not ask him as to the state of his knowledge and belief, which may be obtained upon interrogatories. It does not seem to me that the cases which relate to the confidential communications themselves necessarily govern that question."

The following extract from the judgment of Cotton, L. J. on pp. 407—408 sets forth the ground of his own decision though *qu.* (see *post*, p. 361) whether it was that of the decision of Baggallay, L. J.: "I have come to the conclusion, and I understand Lord Justice Baggallay to be of the same opinion, that these interrogatories are not questions as to any fact patent to the senses—anything which could be seen with the eyes or heard with the ears. Of course the information received by the solicitor is in a sense a fact heard by the ears: but the question is whether the client is bound to communicate to the other side the result of the inquiries made by his solicitor. The information which a solicitor employed to obtain materials for his client's defence communicates to the client is privileged if it is not merely the statement of a fact patent to the senses but is the result of the solicitor's mind working upon and acting as professional adviser with reference to facts which he has seen or heard of. Here the questions are not of this kind—whether there is in such a churchyard a tomb with such an inscription—whether there is in such a parish book an entry of such a marriage or such a death." (See also a passage in the judgment in *Lonsdale v. Heaton*, Young, p. 78, referred to *post*, p. 437: but see *post*, p. 362, as to the views taken in the House of Lords on this point). "Those are inquiries which the solicitor or client might be bound to answer: it is not necessary to decide now whether they would, though some of the cases referred to certainly go that length." (See the various cases discussed *post*, p. 436 to p. 440). "The questions here are of this kind 'Were not A. and B. co-heiresses of M.? Was not C. the last lawful descendant of N.?' and so forth—all questions not as to facts patent to the senses but as to the probable results and inferences of and from facts patent to the senses (and see the same judge in *Lyell v. Kennedy*, cited *post*, p. 392, 'results or deductions drawn by the legal advisers from the facts relating to the pedigree which came to their knowledge'). Having regard to the way in which the solicitor was employed on behalf of his client for the purpose of

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\* It may be noted that he relies upon the distinction between answering such questions and disclosing the reports as a whole, that the reports as a whole would be certain to contain confidential advice and inferences drawn by the solicitor. As to whether in any cases it is necessary to distinguish between different portions of a document on grounds of this kind see *post*, p. 372.

protecting his interests and obtaining evidence for his defence, I am of opinion that the client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him or as to the effect on his mind of what he has seen or heard any more than he would be bound to produce as a whole the confidential reports made to him whether in writing or verbally by his solicitor as to the result of the inquiries which the solicitor has made." In this respect Baggallay, L. J. takes the same line, considering that if the questions had been as to mere matters of fact the plaintiff would be bound to answer though he only learnt the fact from his solicitor who had discovered it while seeking evidence for his defence, but that none of these interrogatories were interrogatories upon mere matters of fact; each of them involving either a single matter of fact taken in connection with other matters of fact derived from other sources, or a matter of fact in connection with an inference of law. And he gives the following illustration. "Is there not a tombstone in the churchyard at Perth to the memory of G. D.?" That is a question as to a mere matter of fact. But if for "G. D." is put "the said G. D.," it is not such a question, for it involves the further question whether the person named on the stone is the same person as the person who is the subject of the interrogatory. Qu. whether by the expression "mere matters of fact" Baggallay, L. J. intended to cover any wider ground than that covered by the expression used by Cotton, L. J. "facts patent to the senses," which is limited to such facts as the legal adviser would be bound to disclose, as to which see *post*, p. 436. As to the analogy suggested, pp. 395, 406, between the disclosure of facts and the production of documents and copies previously in existence see *post*.

The judgments of Cotton and Baggallay, LL.J. seem however to some extent at all events to run on different lines. That of Cotton, L. J. (and see the same judge in *Lyell v. Kennedy*, *post*) would seem to be based on the view that the information acquires a special character as being the result of the application of the solicitor's mind and skill to his client's case, and from this point of view there would seem to be a strong analogy between a disclosure of this nature and the production of documents, and copies of documents previously in existence but obtained and made by or by the direction of the solicitor for the purpose of his client's case; for except in the instance of the disclosure of a patent fact in the one case, and the production of a particular document in the other case (see *post*, p. 436, and *post*, p. 394, referring to the criticisms of Cotton, L. J. on *Balguy v. Broadhurst*) the disclosure cannot be made or the documents produced without discovering the view taken or advice given by the solicitor (see *post*, p. 392, as to this point in connection with the production of such documents): from this point of view also the privilege might (but see *post* referring to *Lyell v. Kennedy* as regards the solicitor's agents) attach equally whether the information has been obtained in view of litigation or not (see *post*, p. 392 as to this point in connection with the production of such documents), while it might fail to attach (see also the same judge in *Lyell v. Kennedy*, *post*, and *post*, p. 392) where it had been obtained independently by the client as materials for evidence (assuming that such materials when procured by the client otherwise than by the solicitor's direction are privileged, as to which see *post*, p. 410), or in fact otherwise than under the solicitor's direction even if for the purpose of communication to him (and see also, referring to a suggestion in *Hooper v. Gumm*, *post*, p. 424), though the documents which have come into existence for the purpose of such communication are protected, see *post*, pp. 390, 415. That of Baggallay, L. J. on the other hand (see p. 400) would seem to be partly based on the view that the information came within the description of evidence obtained for the purpose of litigation and therefore privileged according to *Wheeler v. Le Marchant*; according to this view the privilege would not attach where the information was not obtained for the purpose of litigation: see *post*, p. 401, referring to *Wheeler v. Le Marchant*: and see generally in this connection a passage in the judgment of Wigram, V. C. in *Llewellyn v. Baddley*, referred to *post*, p. 411. These views may however quite well stand together.

The point again came before the Court of Appeal (Cotton, Bowen, Fry, LL.J.) in the cross action of *Lyell v. Kennedy* (cited *post*, p. 392): the form in which the protection was there claimed was rather fuller, his only information being said to be derived from information of a confidential nature procured by his solicitors or agents for the purpose of his defence against the aforesaid claims (he having in another part of his answer said that he had caused inquiries to be made under threats of and in contemplation of immediate litigation on the part of persons claiming to be heirs of A. D.) and in defence of his title and for the purpose of enabling them and counsel to advise him and conduct his defence against the aforesaid claims. A further answer was ordered in reference to the expression "solicitors or agents"; for if a man does not employ a solicitor he cannot protect that which if he had employed a solicitor would be protected (see further as to this *post*, p. 392), that the reason of the privilege was to enable the legal adviser of a person involved in litigation to make a sufficient investigation and so obtain the fullest means of ascertaining what advice he should give, without those searches communications responses being pryed into, that the privilege was confined to that which was communicated to or by the client to or by the solicitors or the agents who could be treated properly as agents of the solicitors, and therefore a further affidavit must be put in by the defendant stating whether they were his agents or the agents of the solicitors and persons who would be entitled to the protection given to solicitors, and necessarily of course to the agents of the solicitors, as every attorney's clerk may be said to be (*sic*, as reported in the *Law Times*, see *post*, p. 392). See *post*, p. 401, as to the necessity of restricting the meaning of the term "agents" where the matter has no reference to litigation.

In the House of Lords in *Kennedy v. Lyell* (*ante*, p. 359) the question seems to have been presented in rather a different form. Lord Blackburn, at p. 86, after pointing out that it was undisputed that the brief itself was privileged says, "But then it is argued that though this is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whence soever derived, and that it consequently follows from that (this I think is the argument that was put) that although a brief has been refused, and it has been said, 'You must not inspect that brief,' you are nevertheless entitled to ask the party himself, 'Did not you read the brief, and when you had read it what was your belief derived from reading that brief?' That was I think the position taken." So Lord Bramwell at p. 93 says, "The questions really put to the plaintiff are the following: 'What are your knowledge, information and belief,' upon such and such matters? The plaintiff says, 'Personal knowledge I have none; information I have none except that which has been derived from privileged and confidential communications from my solicitor;' therefore belief he can have none except that which is founded upon that information. Now how can it possibly be held that not being bound to give the information he is nevertheless bound to state his belief which is founded upon it?" And the conclusion arrived at was that the brief or information being privileged, the belief founded on that brief or information was also privileged: see pp. 87, 93: per Lord Watson at pp. 91—92, that such a belief was in the nature of a mere speculative opinion, and not such a belief as litigants entertaining it could be compelled to state, that it would be very difficult for a party to state his belief without divulging the information, and that (see *ante*, p. 128) where a party was under legal obligation to state his belief, he must state the grounds of it: per Lord Bramwell, at pp. 93—94, that (see *ante*, p. 118) a party was entitled to state the reasons for his belief, and therefore if he were compelled to state his belief founded upon privileged information, he would be deprived of that right unless he waived the privilege.

As to the excepting from this rule questions relating to mere matters of fact (see *ante*, p. 360) Lord Bramwell at pp. 93—94 seems to have doubted, thinking that even to a question asking "What is your information and belief as to there being a tombstone in a certain churchyard with a certain inscription on it?" the party might wish to say, "I have been told, but I



may have been misinformed." Lord Blackburn seems to have considered that the party would have been bound to answer anything which pointed to the fact that his attorney had found a pedigree stating who were the next heirs: see also his observations on p. 87: and those of Lord Watson on pp. 90—91 as to a belief constituting personal knowledge. Reference may be made to interrogatories of a somewhat similar kind and the answers thereto in *Wood v. Hitchins*, 3 Beav. 504.

In some earlier cases there are dicta which at first sight might seem to bear upon the point now under consideration, but in every case the mind of the judge seems to have been directed only to the disclosure of the actual communications and not the disclosure of particular facts happening to be contained therein in answer to interrogatories.

In *Churton v. Frewen*, 2 Dr. & Sm. p. 392, Kindersley, V. C. observes that the general principle is that what a party to a suit knows respecting the matter in dispute his adversary has a right to know, but that if this principle were carried to its extreme consequence and he were compellable to produce communications made to him by his solicitor free intercourse between a party and his solicitor would be prevented.

In *Pearse v. Pearse*, 1 D. G. & Sm. p. 26, Knight-Bruce, V. C. observes that the client is or may be compellable to disclose all that before he consulted the counsel or solicitor he knew believed or had seen or heard, but he deals subsequently only with the question of disclosing the actual communication.

Mr. Hare, in *Hare on Discovery*, pp. 174—175, observes that where the interrogatories are addressed to the client he cannot avoid answering by merely showing that the facts exist in the shape of communications to or from his professional advisers but that he must bring them within a much narrower ground of protection. But he seems only to have intended to refer to the distinction then (see *post*, p. 368) existing between the position of the client and the professional adviser.

Reference may also be made to a passage in Lord Brougham's judgment in *Bolton v. Corp. Liverpool*, 1 M. & K. p. 94.

In *Greenlaw v. King*, 1 Beav. pp. 143—144, Lord Langdale observes as follows: "The general rule of the court is no doubt that what the defendant knows relating to the matters in question the plaintiff has a right to know also, and for this very purpose to prevent the defendant from suppressing within his own breast the matters material to the determination of the question between the parties. A defendant may resist a just demand knowing from circumstances solely within his own knowledge such resistance on his part to be unjust: this would be a fraud and could only be prevented by a discovery." And so as to the plaintiff. "But there are exceptions to the general rule, and one is where knowledge of the fact has been communicated between the party and his solicitor, and it has been argued that in every case in which a solicitor is bound to conceal his knowledge the client himself ought to be protected from making such discovery. I do not accede to that proposition. There are many cases in which it would be contrary to the duty of a solicitor to disclose facts of which upon a bill being filed in this court the client would be bound to make a discovery: this shows that the two propositions are not co-extensive: the solicitor may not be bound or not permitted to disclose matters which come to his knowledge as a solicitor. It is decided that if the knowledge be obtained through his solicitor there may be a protection: but in this case it is apparent that the knowledge of the defendant has not come to him through his solicitor."

The following extract from the judgment of Turner, L. J. in *Barned's*



*Banking Co.* L. R. 2 Ch. pp. 353—354, may perhaps be thought to bear on the point. The documents in question had been prepared by the official liquidators for their guidance in making calls, &c. "If such a bill had been filed it would have been competent to the alleged shareholder to ask the liquidator all or most of the questions which have been put on this examination as to the grounds on which he had come to the conclusion at which he has arrived and on what particular materials. I do not see how he could have refused to answer such questions or to produce such materials, unless the matters to which the questions relate or the materials had passed as confidential communications between him and his solicitor. I do not understand that any of the documents in question are said by the appellants to come up to that. It is not said that they were prepared to enable the solicitor to frame the affidavit or for any other purpose which would bring the answers to the questions within the authorities as to confidential communications between solicitor and client."

Where the information is the information of the party's agent, and, as such, information which he is bound to obtain if required, see *ante*, p. 138, he cannot refuse to disclose it in answer to interrogatories on the ground that it has already been obtained from the agent by the solicitor or by his direction as materials for evidence: see *Pavitt v. North, &c. Co. post*: but see *Gort v. Rowney, post*. The knowledge of the agent is the knowledge of the principal: see *ante*, p. 138.

In *Pavitt v. North Metropolitan Tramways Co.* W. N. 83, p. 100: 48 L. T. 731, an action by the conductor of an omnibus against the company for negligence in running into him with the pole of their tramcar, the plaintiff interrogated them (by their secretary) *inter alia* as to whether he did not raise his hand to warn the driver of the tramcar to stop and whether the driver did not see such warning. The secretary in his answer referred to a report of the driver disclosed in the affidavit of documents but which contained no information on this point and added that certain further evidence had been collected by the company's solicitor or by his direction with a view to their defence and that save as aforesaid he had received no information with reference to the said accident and submitted that he was not bound to disclose such information. It was held that a party was bound if required to obtain any information in the possession of his servants or agents acquired in the ordinary course of their business; though not from third persons (see *ante*, p. 142), and that here it was the company's duty to make all necessary inquiries of the driver so as to answer the interrogatories and that they did not justify their refusal because the evidence had been obtained by their solicitor for the purpose of their defence.

*Gort v. Rowney*, 28 S. J. 533, was an action by the owners of a house (No. 12) against the owners of an adjoining house (No. 11) for injuries to No. 12, in the course of rebuilding No. 11, and in breach of an agreement to execute the work to the satisfaction of the plaintiff's architect and surveyor, the statement of claim alleging that the work had been done negligently and not to such satisfaction. Interrogatories were administered to the plaintiffs asking in what respects it was so done negligently and not to such satisfaction, and similarly as to certain allegations in reference to the cracking and giving way and negligent rebuilding of the party-wall, and whether the wall and No. 12 were not originally badly constructed. The plaintiffs answered "We have no personal knowledge of any of the matters inquired after by the said interrogatories. Such information as we have received in respect of the said matters has been derived by us from information procured by our solicitors

and their agents in and for the purposes of the present litigation." It was held that the answer was sufficient: that it was not a case in which the plaintiffs were to be presumed (see *ante*, p. 141) to have had knowledge of the matters inquired after whether personally or through their agents or servants previous to and independently of the present proceedings: that any such knowledge was distinctly negatived in the answer: and that it was governed by *Lyell v. Kennedy*, *ante*, p. 359. But qu. if their agents had the information; for the principle is that the knowledge of the agent is the knowledge of the principal, see *ante*; and they only negatived personal knowledge.

Generally where an interrogatory is put the test of the sufficiency of the answer is not whether the matter enquired after is contained in a privileged document but rather whether it is privileged in itself independently of the document in which it may be contained.

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#### 364. To precede "*Pavitt v. North, &c. Co.*"

In a recent case *London and Tilbury, &c. Co. v. Kirk*, 51 L. T. 599, the defendants being asked as to their or their agents' knowledge, information and belief, and answering that they had no information beyond what appeared in certain reports from their agents, which had been held privileged, the Divisional Court held the answer sufficient, for it could not be answered without giving the contents of reports which had been held privileged: but qu. see *ante*: also note, *ante*, p. 139: and *post*, pp. 416, 417.

WHICH OUGHT TO BE ANSWERED ONLY BY REFERENCE TO PRIVILEGED DOCUMENTS. But insufficiency is not a ground for production. If a defendant says "I can only answer to the same effect as a particular letter but that was to my solicitor and I decline to produce it" the proper course is to except to the answer given by reference to a privileged document, for to decline to produce it is to give no answer. If the document is withheld the information must be given or the answer is insufficient." And then after distinguishing *McIntosh v. G. W. R.* as containing an offer to produce, see *ante*, p. 255, Lord Hatherley says, p. 706, "The defendant clearly cannot insist on the protection given to certain documents to relieve herself from answering fully."

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II. *Whether Privileged Matter loses its Privilege by Communication to other Persons. Whether it retains its Privilege in whatever Document it may be found.*

The mere gratuitous production or communication of privileged matter in the shape of a copy or otherwise to some other person (not the adversary, see *post*) cannot it is conceived have the effect of depriving the client of his right to refuse discovery of it, unless the production or communication is such as altogether to deprive it of its confidential (see *post*, p. 378) character: it may perhaps be doubted whether the person to whom the production or communication is made could refuse discovery either by way of answers to interrogatories, or by way of production of the copy, such copy being his own sole property, see *ante*, p. 206, for the confidential nature of the production or communication to himself constitutes no objection to discovery, see *ante*, p. 303. See as perhaps bearing on this point, *post*, p. 440, as to production of documents in court: *post*, pp. 433, 440, as to communications to a solicitor for the purpose of production or communication to other persons: and *Enthoven v. Cobb*, discussed *post*, p. 371, and *ante*, p. 207, where a copy of a case and opinion was protected in the hands of the person to whom it had been lent.

But it might be that a document communicating to another person (not the adversary and not a person on behalf of whom the opinion has been taken) the effect of an opinion or even the opinion itself in actual terms would be held outside the privilege in some cases. It might perhaps be said (see *ante*, p. 350, *post*, p. 423, and *Bolton v. Corp. Liverpool*, 1 M. & K. p. 95), that there is no necessity for any such communication and therefore the document should not be protected. In a recent case in chambers (ex rel.) a master compelled production of a letter of this kind. On the other hand letters in themselves not privileged were held privileged as to such parts as contained legal advice or opinion: see *Glyn v. Caulfield*, 3 M. & G. p. 474: *Walsingham v. Goodriche*, 3 Ha. p. 131: *Manser v. Dix*, 1 K. & J. p. 454: *Sankey v. Alexander*, Ir. Rep. 8 Eq. p. 243: *Preston v. Carr*, 1 Y. & J. 175 (where a case for

opinion was held unprotected as the law then stood except so far as it recited a previous opinion) : and see *post*, p. 369.

The question (which perhaps bears on this point) whether where an attorney confidentially entrusted with a document communicates its contents to or suffers another person to take a copy the secondary evidence may be admitted is discussed in *Phill. Evid.* pp. 116—117. The learned author considers that the privilege should attach in such a case and insists on the distinction between this case and the case where a document is stolen from the attorney for there is there no breach of trust: *Fisher v. Hemming*, Leic. Lent Ass. 1809, reported in *Phill. Evid.* p. 116, supports this view: but later cases *Lloyd v. Mostyn*, 10 M. & W. 481 and *Cleare v. Jones*, 21 L. J. Ex. 106 : 7 Exch. 428, are the other way: see also *Greenlaw v. King*, 1 Beav. p. 145, referred to *post*, p. 387.

As to communications between co-plaintiffs and between co-defendants see *post*, p. 422.

It may very well be that the privilege would be lost by the communication of privileged matter to the adversary himself (see *post*, pp. 434, 435, referring to *Griffith v. Davies* and other cases as to communications between opposite parties by their solicitors), at all events under such circumstances as suggested in *Carey v. Cuthbert*, Ir. Rep. 6 Eq. 599, p. 602, where for instance the party communicates a case and opinion of counsel to the adversary in order to influence his judgment in the prosecution of the suit (see also *post*, p. 384). In this production was refused, a copy only of an opinion having been shown, and not the case and opinion, which were communicated only to the extent of the contents of the copy and therefore might have contained other matters.

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III. *As to the general nature of Privileged Communications passing between the Client and the professional Legal Adviser and Communications and Documents standing on the same footing.\**

Such communications are privileged whether they pass in reference to expected or actual litigation or not: *Minet v. Morgan*, L. R. 8 Ch. 361: *Mostyn v. West Mostyn Coal Co.* 34 L. T. 531; whether as regards the conduct of litigation or the rights to property: Jessel, M. R. in *Wheeler v. Le Marchant*, 17 Ch. D. p. 682: and see *Pearse v. Pearse*, 1 D. G. & Sm. p. 18: *Herring v. Cloberry*, 1 Ph. p. 95: and *Greenough v. Gaskell*, 1 M. & K. p. 102, referring to the solicitor's privilege. It is not now necessary as it formerly was for the purpose of obtaining protection that the communications should be made either during or relating to an actual or even an expected litigation. It is sufficient that they pass as professional communications in a professional capacity: Kindersley, V. C. in *Laurence v. Campbell*, 4 Dr. p. 490, referred to and approved by Lord Selborne in *Minet v. Morgan*, p. 368: and see *Eadie v. Addison*, 31 W. R. 360: (see the judgment of James, L. J. in *Original, &c. Co. v. Moon*, cited *post*, p. 373, which seems to limit somewhat unduly the broad principle laid down in the above cases). The law of the court did not at once reach a broad and reasonable footing but reached it by successive steps founded upon that respect for principle which usually leads the court aright: Selborne, L. C. in *Minet v. Morgan*, p. 366.

Up to comparatively recent times the privilege was a matter of fact† confined (though the principle was sometimes stated in a manner sufficiently

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\* Where litigation is anticipated or where a dispute has arisen the privilege covers considerably wider ground than where it is not so: documents and communications which are privileged only where litigation is anticipated or dispute arisen are considered *post*, Section X. By documents and communications standing on the same footing as direct communications between solicitor and client are meant documents and communications which enjoy the same measure of privilege: these are considered *post*, Sections VIII. and IX.

† See also the following cases as to the law at that period: *Walker v. Wildman*, 6 Madd. 47: *Hughes v. Biddulph*, 4 Russ. 190: *Vent v. Pacy*, *ibid.* 193: *Preston v. Carr*, 1 Y. & J. 175: *Garland v. Scott*, 3 Sim. 396: *Bolton v. Corp. Liverpool*, 1 M. & K. 88, affirming 3 Sim. 467: *Nias v.*

wide to justify an extension: see *Minet v. Morgan*, p. 367, referring to Lord Cottenham in *Nias v. N. & E. R. Co.* 3 M. & C. 355, p. 357, and Lord Lyndhurst in *Herring v. Cloberry*, 1 Ph. 91, pp. 94, 96: and see *Walker v. Wildman*, 6 Mad. p. 48) to communications passing in contemplation of and in reference to litigation whether actually commenced or which was expected and afterwards arose, or after dispute between the parties followed by litigation but not in contemplation of or with reference to that litigation, or on the subject-matter in question after or in contemplation of litigation on the same subject with other persons with the view of asserting the same right, and was never extended to those communications which passed in reference to the very subject in respect of which that dispute had arisen, but before any dispute could be said to have arisen: *Walsingham v. Goodricke*, 3 Ha. pp. 124—126: unless they were opinions of counsel (or drafts prepared by counsel as containing marginal observations or alterations which were considered to fall within the definition of legal advice: see *Manser v. Dix*, 1 K. & J. p. 454) or unless and to the extent that they contained legal advice or opinion. On the one hand it seems (though it is not absolutely clear) that communications even from the client to the professional adviser were protected to that extent, while on the other hand communications from the latter were only protected to that extent, statements of fact therein not being protected (see *ante*, p. 360, and *post*, p. 372, as to the existence of any such distinction at the present time): see *Walsingham v. Goodricke*, p. 124: *Manser v. Dix*, p. 454: *Preston v. Carr*, 1 Y. & J. p. 178: *Hawkins v. Gathercole*, 1 Sim. N. S. p. 154: *Pearse v. Pearse*, 1 D. G. & Sm. p. 18: *Bluck v. Galsworthy*, 2 Giff. p. 456.

It is impossible to justify this distinction in point of reason, principle, justice, or convenience: *Pearse v. Pearse*, pp. 27, 28: *Manser v. Dix*, p. 454: *Herring v. Cloberry*, 1 Ph. p. 95: *Greenough v. Gaskell*, 1 M. & K. pp. 102—103. Perhaps of all communications between a party and his professional adviser the greatest hardship would be caused by the disclosure of those which passed in reference to suspected flaws in his title to an estate, which it is not his duty either in point of law or equity to disclose to any person: see *Pearse v. Pearse*, pp. 27—29: *Manser v. Dix*, pp. 455—456, 459: *Knight v. Waterford*, 1 Y. & C. p. 41: *Herring v. Cloberry*, 1 Ph. p. 95: *Original Hartlepool Colliery Co. v. Moon*, 30 L. T. p. 585. In *Greenough v. Gaskell*, 1 M. & K. p. 102, Lord Brougham observes that professional advice is often required by a person on the subject of his rights and liabilities without any reference to litigation other than all human affairs have, so far as every transaction may possibly become the subject of judicial inquiry. Protection was refused to communications of this character by Lord Langdale in *Flight v. Robinson*, 8 Beav. 22, being cases submitted to counsel on behalf of the vendors (assignees of an insolvent) for their security and protection in their management of the estate previous to the sale (by auction), specific performance of which they were now seeking to enforce, and letters between themselves and their solicitors during the same period, on the ground that they had no reference to the dispute which resulted in the present litigation, though it was allowed to similar documents after the sale relating thereto

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*N. & E. R. Co.* 3 M. & C. 355, affirming 2 Keen, 76: *Herring v. Cloberry*, 1 Ph. 91: *Clagett v. Phillips*, 2 Y. & C. C. C. 82: *Coombe v. Corp. London*, 1 Y. & C. C. C. 631: *Storey v. Lennox*, 1 Keen, 341, affirmed 1 M. & C. 525: *Holmes v. Baddeley*, 1 Ph. 476, reversing 6 Beav. 521: *Flight v. Robinson*, 8 Beav. 22: *Calley v. Richards*, 19 Beav. 401: *Boyd v. Petrie*, 20 L. T. pp. 935—936: 17 W. R. 903: *Beadon v. King*, 17 Sim. 34: *Warde v. Warde*, 1 Sim. N. S. 18: 3 M. & G. 365: *Ford v. De Pontes*, 7 W. R. 299: *Hawkins v. Gathercole*, 1 Sim. N. S. 150: *Bluck v. Galsworthy*, 2 Giff. 453: *Hughes v. Garnons*, 6 Beav. 352: *Mornington v. Mornington*, 2 J. & H. 703: *Jenkyns v. Bushby*, L. R. 2 Eq. 547.



and to the objections to title, &c. as having reference to the dispute.\* In *Manser v. Dix* Lord Hatherley, pp. 455—457, strongly disapproved this decision and considered that it could not stand with *Pearse v. Pearse*. And the case is clearly of no authority in this respect now, see further *post*, p. 374. Its unreasonableness (so great an anomaly so gross and inconsistent a rule, *Thompson v. Falk*, 1 Dr. p. 26) is illustrated by the fact that where the professional adviser was the person of whom the disclosure was sought the distinction between dispute having and not having arisen did not exist: *Greenough v. Gaskell*, 1 M. & K. pp. 101, 110—115, disapproving *Wadsworth v. Hamshaw*, 2 Brod. & B. 5: *Clark v. Clark*, 1 M. & R. p. 5: *Williams v. Mudie*, R. & M. 34: *Broad v. Pitt*, 1 M. & M. 234: where such a distinction was suggested: *Herring v. Cloberry*, 1 Ph. 91: *Walsingham v. Goodricke*, 3 Ha. p. 124: *Cromack v. Heathcote*, 2 Brod. & B. 1: *Pearse v. Pearse*, 1 D. G. & S. p. 25: *Flight v. Robinson*, 8 Beav. p. 39.

The limitation was principally founded upon what was supposed to be the authority of an old case in the House of Lords, *Radcliffe v. Fursman*, 2 B. P. C. 514 (see *Richards v. Jackson*, 18 Ves. 472), where a case stated for counsel's opinion, but not the opinion itself, was ordered to be produced. In this case, as pointed out by Lord Brougham in *Bolton v. Corp. Liverpool*, 1 M. & K. p. 95 (and see *Nias v. N. & E. R. Co.* 3 M. & C. p. 358), "no suit was instituted or even threatened at the time this case was stated for counsel's opinion: all the court knew was that at some time a case had been laid before counsel:" and accordingly, p. 96, he did not consider it to rule that a disclosure must be made of a case laid before counsel in reference to or in contemplation of or pending the litigation for the purpose of which production was sought; subsequently its scope was narrowed still further: see *ante*, p. 369, referring to *Walsingham v. Goodricke*. On the other hand it was held to cover communications to (and "from" see *ante*, p. 369) the solicitor except so far as they contained legal advice or opinion, on the ground that it was impossible to distinguish in principle between them and the case as actually stated for counsel's opinion: see *Walsingham v. Goodricke*, p. 129: *Bolton v. Corp. Liverpool*, p. 96: *Nias v. N. & E. R. Co.* p. 357: *Pearse v. Pearse*, 1 D. G. & Sm. p. 25: see however *Walker v. Wildman*, 6 Mad. 47. In spite of occasional suggestions from the bench as to certain features special to the case of *Radcliffe v. Fursman* (see *Richards v. Jackson*, 18 Ves. p. 474, *Walsingham v. Goodricke*, 3 Ha. p. 129) which would have entirely destroyed its authority for the application that was made of it, this state of the law was accepted until *Pearse v. Pearse*, 1 D. G. & Sm. 12, when *Radcliffe v. Fursman* underwent a thorough examination. Following the line of these suggestions Knight Bruce, V. C. showed that the circumstances of *Radcliffe v. Fursman* were altogether exceptional, that it did not appear that the case of which production was ordered was taken solely in the interest or on behalf of the party called upon to produce it, but that it was or may have been taken partly in the interest or on behalf of the party seeking its production, and that the former held it or may have held it as a quasi trustee for the latter (as to this point see *post*, p. 379): and so also, pp. 23—24, in *Richards v. Jackson* where the case seems to have related to partnership transactions though after dissolution of the partnership: and finally, see pp. 18, 24, that neither of these cases was any authority for the proposition that a professional communication relating to the rights of property made by a person not under any fiduciary obligation nor having a community of right or interest with any other person on his sole behalf and in his single and separate interest must be disclosed if not made during suit or dispute or after threat of suit. *Radcliffe v. Fursman* being thus effectually disposed of,

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\* It may be noted that Lord Langdale was in favour of curtailing the privilege as much as possible, and particularly (see *Flight v. Robinson*, p. 36) of compelling the disclosure of all statements or admissions made by the client to his solicitor: see also his observations in *Storey v. Lennox*, 1 Keen, pp. 349—350.



there was no ground for any longer keeping up any such restriction, and accordingly in *Minet v. Morgan*, L. R. 8 Ch. p. 368, Lord Selborne formally adopted the extension thus given and the principle advocated in *Pearse v. Pearse*, approved by Lord Hatherley in *Manser v. Dix*, 1 K. & J. 451 (though at p. 460, in deference to *Walsingham v. Goodricke*, he distinguishes it from the case before him, see *post*, p. 374), and laid down by Kindersley, V. C. in *Laurence v. Campbell* in the absolute terms stated *ante*, p. 368: see also *Turton v. Barber*, L. R. 16 Eq. p. 331: and *ante*, p. 368.

It should seem clear that the extension of the privilege to all professional communications whether passing in reference to litigation or not must cover those which pass in reference to litigation with other persons or with the same persons at other times.

Even when the distinction between dispute and no dispute obtained the privilege was extended to communications passing in reference to litigation with other persons. But it seems to have been always limited in terms to litigation on the same subject with a view of asserting the same right: *Walsingham v. Goodricke* 3 H. & N. 125. or where the alleged right in

### 371. To follow text "other times."

The proposition in large print on p. 371 was approved by Lord Esher in a recent case of *Pearce v. Foster*, 15 Q. B. D. 114, at p. 121. See this case discussed, *post*, p. 409.

protected on other grounds, see *ante*, p. 368. It is unnecessary to say that there is no ground or even the necessity for any such limitation. The communications are either relevant to the matters in question in the action or they are not relevant. If they are not relevant their disclosure cannot be required, and in fact if documentary they should not be included in the schedule. If they are relevant, they ought to be protected whether the issues or matters in dispute are the same or not: see *Mornington v. Mornington*, 2 J. & H. p. 704: and *Ford v. De Pontes*, 7 W. R. p. 300.

In my opinion the rule is "once privileged always privileged." This will apply *à fortiori* where the succeeding action is substantially the same as that in which the documents were used: Cockburn, C. J. in *Bullock v. Corrie*, 3 Q. B. D. 358.

Lord Lyndhurst in *Holmes v. Baddeley*, 1 Phill. p. 482, questions the materiality of the distinction taken in argument that the subject in controversy was not the same though it related to the same property, and, p. 480, considers that the privilege ought to extend to any subsequent litigation with the same or any other parties.

In *Wilson v. Rastall*, 4 T. R. p. 760, it was said that the nature of the privilege was that the attorney should not be permitted to disclose in any action that which had been confidentially communicated to him as an attorney: it was not sufficient to say the cause was at an end, his mouth was shut for ever: *ibid.* p. 759. So Lord Kenyon in *Du Barré v. Livette*, Peake, p. 111, said that it was immaterial whether the cause for the defence of which the communication passed was at an end or not, for it ought equally to remain locked up in the bosom of those to whom it was communicated. And this seems of equal application to disclosure sought of the client.

At any rate at the present day there is no reason for retaining any such limitation whether it ever had any validity or practical effect or not.

It is not every communication between a client and his legal adviser that is protected: *Gardner v. Irvin*, 4 Ex. D. p. 53: *Penruddock v. Hammond*, 11 Beav. p. 61. The communications must be professional.

Where an attorney is employed by a client professionally to transact professional business all the communications that pass between the client and attorney in the course and for the purpose of that business are privileged: *Herring v. Cloberry*, 1 Ph. pp. 94, 96.

Communications to solicitors in their professional capacity on matters within the ordinary scope of professional employment: *Greenough v. Gaskell*, 1 M. & K. p. 102: and see *Shellard v. Harris*, 5 C. & P. p. 594:\* communications made by the client to counsel, attorney or solicitor for professional assistance: *Walker v. Wildman*, 6 Madd. p. 47: confidential communications between client and solicitor in their relation of client and attorney: *Hughes v. Biddulph*, 4 Russ. p. 191: professional communications between client and solicitor of a confidential character for the purpose of getting legal advice: *Gardner v. Irvin*, 4 Ex. D. p. 53: not for information as to matters of fact, except perhaps in reference to litigation, see *post*, p. 440. Letters written by the solicitor in the character of solicitor: *Goodall v. Little*, 1 Sim. N. S. p. 164: communications with the solicitor for the purpose of obtaining legal advice though they relate to a dealing not the subject of litigation provided they are communications made to the solicitor in that character and for that purpose: *Wheeler v. Le Marchant*, 17 Ch. D. pp. 682, 683: professional communications passing in a professional capacity: *Lawrence v. Campbell*, 4 Dr. p. 490, approved *Minet v. Morgan*, L. R. 8 Ch. p. 368: and see *Eadie v. Addison*, 31 W. R. 360: and *Beadon v. King*, 17 Sim. p. 37.

It has been seen, *ante*, p. 359, that under some circumstances the client may be compelled in answer to interrogatories to disclose facts which have been communicated by him to his solicitor or by his solicitor to him. There is no authority (except in some earlier cases in a different state of the law, see *ante*, p. 369) for excepting from protection those parts of privileged communications which consist of mere statements of facts. Under some circumstances, see *post*, p. 391, extracts from previously-existing documents may have to be produced for inspection the rest of the documents containing such extracts being covered or sealed up: but with this exception a privileged communication is protected as a whole: see in this connection observations of Selborne, L. C. and Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. pp. 401, 404, referred to *ante*, pp. 360—361: but see also *post*, p. 397.

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\* These dicta though at that period applicable only to the case where disclosures were sought of the attorney may be regarded at the present day as applicable to the case of the client, see *ante*, p. 370.

IV. *As to what is Professional Business or what are Matters within the ordinary scope of Professional Employment (see the passages cited ante)—relating to a Sale or Bargain—Agency Matters—procuring Loans or investing Money.*

In addition to the following observations and cases see also *post*, p. 430 to p. 442, where the position of the legal adviser is discussed, and in particular *post*, p. 439.

The following observations of James, L. J. in *Original Hartlepool Colliery Co. v. Moon*, 30 L. T. p. 585, are important. "A client has a right in availing himself of professional advice to put himself in the most unreserved confidential communication with his solicitor for the purpose of obtaining that solicitor's assistance and advice as a professional man with respect to the question that has arisen or may arise or with reference to the defence of the suit, and all that is done in that strictly professional character with a view to protection against a claim that is anticipated or with a view to protection against a claim that is made—all that is from the necessity of the case considered by this court to be privileged; but communications between a man and his solicitor with reference to what may be called the subject-matter of the suit are not necessarily privileged. The subject-matter of the present suit is whether an agreement was or was not made. The communications between a man and his solicitor may be wholly irrespective of any question of professional advice or assistance of any kind. The communications may be made authorizing the solicitor to enter into a bargain, or to give directions to somebody else to enter into a bargain. Communications may happen to be made with a man who happens to be a solicitor which would be exactly of the same character as, and neither more nor less privileged than, those between a man and his steward, or between a man and his land agent who did not happen to be a solicitor." The learned judge then refers to *Minet v. Morgan* and *Pearse v. Pearse* and to the extension supposed to be given by those cases, and regards them as establishing only that communications for the purpose of seeking professional advice with respect to

defects or flaws in the party's title to property when no dispute had arisen but which might or might not become the subject of litigation were protected. It is submitted, *ante*, p. 368, that this is too narrow a view to take of these cases (see also a passage in *Greenough v. Gaskell*, cited *ante*, p. 369), though the documents in question in *Minet v. Morgan* seem to have been of the character referred to by James, L. J. being communications with reference to the subject-matter in dispute (rights of common) or to questions connected with the matters in dispute.

In *Manser v. Dix*, 1 K. & J. p. 460, Lord Hatherley supports his decision on special grounds of that kind but only in order to distinguish it from *Walsingham v. Goodricke*, 3 Ha. 122, in which case the documents which Wigram, V.C. reluctantly ordered to be produced were letters between the vendor (defendant to action for specific performance) and his solicitor while the negotiations were in progress, relating apparently to the draft agreement submitted by the intending purchaser, but before dispute arisen. In *Manser v. Dix* the plaintiff disputed the title of a defendant who had purchased the property as being affected with notice of facts which would give him an equity to set it aside: the document in question was instructions to counsel on the part of the defendant for the draft agreement. Lord Hatherley, at p. 460, distinguishes between the two cases on the ground that in *Walsingham v. Goodricke* the question was not a question upon the title, but whether there had been a contract or not, and the documents passed at a time when no one was apprehending a dispute, but that in *Manser v. Dix* the consultations were as to a proposed conveyance to him in order to make himself secure against the whole world, the doubts and fears so suggested being just those which should be protected from disclosure (see also *ante*, p. 370, referring to Lord Hatherley's comments on *Flight v. Robinson*, and *ante*, p. 370, as to the old law in this respect). *Walsingham v. Goodricke* however being no longer of authority in this respect, see *ante*, p. 370, the distinction is unnecessary.

In *Original, &c. Co. v. Moon* accordingly (see *ante*), which was an action for specific performance of an agreement for a lease of some collieries, protection was refused to communications anterior to the making of the agreement before by possibility any dispute could arise and which could not have reference to anything as to which the party was seeking professional advice or assistance as against the hostile litigation, for there could not be any question between the parties as to the agreement until that which was alleged to be the agreement was made.

The following extract from the judgment of Lord Cottenham in *Carpmael v. Powis*, 1 Ph. p. 692, may be usefully compared with the observations of James, L. J. in this case, *ante*. "The privilege extends to all communications between

a solicitor as such and his client relating to matters within the ordinary scope of a solicitor's duty. Now it cannot be denied that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes he is indispensable in such transactions: he is to draw the agreement to investigate the title and prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character as they might be entrusted equally well to anybody else. It is impossible however to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction, the sale of an estate, and that a transaction in which solicitors are ordinarily employed by their clients."

Communications relating to the sale of an estate according to this last decision, affirming it may be observed Lord Langdale, 9 Beav. 16, are therefore privileged: and see *Mynn v. Joliffe*, 1 M. & R. 326. On the other hand Lord Langdale in *Flight v. Robinson*, 8 Beav. p. 39, distinguished between communications passing between a client and his solicitor in the relation of principal and agent for effecting a sale, and communications passing in the relation of client and solicitor. So in *Walker v. Wildman*, 6 Madd. 47, it was said that where a solicitor was employed in a treaty for the purchase of an estate it was not a professional matter. See also *Original, &c. Co. v. Moon*, and *Manser v. Dix*, *ante*.

In *Doe d. Marriott v. Hertford*, 13 Jur. 632; 19 L. J. Q. B. 526: it was held that an attorney as witness must produce a map given him by his client to show the extent of the glebe for the purpose of a sale, on the ground that the delivery of the map was not a confidential (see *post*, p. 378) communication but was for the purpose of showing it to intending purchasers and therefore practically open to all the world (see as to this point *post*, p. 440), and also that he was the agent employed to effect a sale, and the fact that he was an attorney did not confer a privilege which did not otherwise exist.

In *Stratford v. Hogan*, 2 Ball & B. 164, an attorney was held bound to answer any charges relating to receipts by him of rents for his client, though not as to communications made to him in his character of attorney. In *Doe d. Marriott v. Hertford*, Denman, C. J. considered that an attorney must produce a book describing lands subject to tithes given him by his client for the purpose of collecting them, for he was not acting professionally.

In *Jones v. Pugh*, 1 Phill. 96, Lord Lyndhurst, observing, p. 102, that it was an ordinary part of a solicitor's duty to lay out money for his clients, held on the authority of Lord Nottingham in *Harvey v. Clayton*, 2 Sw. 221, n. where a scrivener (but qu. as to a scrivener, see *ante*, p. 306) was protected from discovering the names of the persons who had entrusted him with the money lent on mortgage to the plaintiff, that the solicitor, defendant to a suit for redemption by a judgment creditor of the mortgagor, was not bound to discover, (1) the names of the clients on behalf of whom he had taken a mortgage in his own name, nor (2) the names of the clients for whom he had effected mortgages on the same property, as to whom he said that he had no knowledge or information except as their solicitor: see also as to the names of clients *post*, p. 439. As to (1) however the discovery was immaterial, as in *Harvey v. Morris*, Finch, 214, for, no trust being disclosed, the solicitor was competent to give a receipt and discharge the mortgage. See also *Turquand v. Knight*, 2 M. & W. 98, p. 100, where on the same authority an attorney was protected as to matters (see *post*, p. 438) brought to his knowledge in his character of scrivener. In a recent common law case of *Bickford v. D'Arcy*, L. R. 1 Ex. 354, p. 357, it was considered that doing the business of a scrivener or investing money was not necessarily incident to the profession of an attorney and therefore not within the 6 & 7 Vict. c. 73, sect. 2 making it a misdemeanor to practise as an attorney without a certificate.

In *R. v. Farley*, 2 C. & K. 313, a prosecution for forgery, the wife of the prisoner had taken the forged will on his behalf to a solicitor to procure an advance on his interest

under it: it was held that the solicitor who had refused to make the advance, the security not being sufficient, could properly produce a copy which he had made and give evidence of what passed: some stress seems to have been laid on the fact that it was not the prisoner's own solicitor. In *R. v. Avery*, 8 C. & P. 596, a somewhat similar case, where also protection was refused and production of the will ordered, the solicitor was acting also for the person who advanced the money. See also as to these cases *ante*, p. 356.

In all cases where as to some matters the attorney was acting in his legal professional capacity and as to other matters not in such capacity the distinction should as far as possible be pointed out in the affidavit: see *Hughes v. Biddulph*, 4 Russ. p. 192.

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#### V. *Miscellaneous.*

Communications are not protected where the professional adviser is only consulted as a confidential friend and not employed as an attorney, though consulted on account of his professional knowledge: *Wilson v. Rastall*, 4 T. R. pp. 754, 758, 760: *Smith v. Daniell*, L. R. 18 Eq. 649, where Lord Westbury was so consulted: and see *Greenough v. Gaskell*, 1 M. & K. p. 104: *Doe d. Pritchard v. Jauncey*, 8 C. & P. 99: and *Blenkinsopp v. Do.* 10 Beav. p. 282: not therefore as to matters before retainer: *Cutts v. Pickering*, 1 Ventris, 197. No protection was allowed to letters written by a country solicitor to one of a firm of solicitors in London who acted as his London agents and also in the suit as his solicitors, but to whom in this instance the letters were written as his private friend and private professional adviser in professional confidence and for the purpose of professional assistance: *Hampson v. Hampson*, 26 L. J. Ch. 612. But where a solicitor had acted for the defendant up to the filing of the bill, but since then had ceased to do so as to the subject-matter of the suit, Knight Bruce, V.-C. refused to order production of notes made by him on a copy of the bill at the defendant's request



as instructions for the answer, thinking it doubtful: *Moxhay v. Tredewick*, 9 Jur. 343.

The privilege attaches although the attorney ultimately refuses the employment: *Cromack v. Heathcote*, 2 Brod. & B. 4: as where the attorney is applied to to draw a deed: *ibid.*: and see *Doe d. Shellard v. Harris*, 5 C. & P. 592, where the attorney as witness was protected from answering whether a party had applied to him to draw a deed.

So the privilege attaches where the party thought that the attorney had consented to act for him: *Smith v. Fell*, 2 Curteis, 667, p. 670.

VI. *Confidential character of the Communications—as against a Cestui que Trust, Wife, Partner, Landlord and other Persons—as between Persons claiming under the Client.*

The communications must be confidential: see *Spenceley v. Schulenberg*, 7 East, p. 358: *Gardner v. Irvin*, 4 Ex. D. p. 53: and *post*, p. 431.

It has been said, see *Marsh v. Keith*, 1 Dr. & Sm. p. 347, that whatever passes between a solicitor and client as a matter of professional business the court will consider as confidential. Qu. however whether this is not too broadly stated. In *Walsh v. Trevanion*, 15 Sim. 578, it was held insufficient for a solicitor, as witness, to say that he had received certain letters from his client in his character of confidential solicitor, for the letters might not be confidential communications. See this subject further considered in connection with the position of the legal adviser *post*, p. 431 to p. 442: and in particular as to communications to the solicitor for the purpose of communicating the matter to other persons *post*, p. 440.

See as to the party's assertion of the confidential character of communications being conclusive *Underwood v. Sec. of State for India*, cited *ante*, p. 231 and *post*, p. 381: and *Pritchard v. Foulkes*, *post*, p. 383.

Qu. whether the communication of legal advice to other persons, or its having been made public in court, would under some circumstances destroy its confidential character, see *ante*,

p. 366, and *Smith v. Daniell*, *post* : and *Underwood v. Secretary of State for India*, *post*, p. 381.

But though a communication may be confidential so far as the general public or a stranger is concerned it may not be confidential in a certain sense as against particular persons. It is not confidential as against the party seeking discovery whenever it passes either in point of law or as a matter of fact on his behalf. (See in this connection *ante*, p. 370, citing *Pearse v. Pearse*.) In fact under such circumstances, if it be a document, the party has an interest in it of the nature of property, and is entitled to its production on that ground. From that point of view such cases should technically be considered perhaps with other cases (see Bk. I. Ch. VII.) where a party is entitled to production on the ground of having an interest of that nature. It is however practically simpler and more convenient to discuss them in connection with the subject of legal privilege.

Where certain cases and opinions were said to have been stated and taken by the plaintiff in anticipation of and in relation to the litigation, but they were not said to have been confidential, and on the facts it did not appear they were confidential, the substance of them having been already communicated to one of the defendants, production was ordered : *Smith v. Daniell*, L. R. 18 Eq. 649, and see *ante*.

(a) *Cestui que Trust and Trustee.*

A cestui que trust is entitled to see all the cases submitted and the opinions taken by the trustee to guide himself in the administration of the trust, for they are so submitted and taken for the purpose of the administration of the trust, and for the benefit of the persons entitled to the trust estate who will have to pay the expenses : *Wynne v. Humberston*, 27 Beav. 421, pp. 423—424 : and see *Deraynes v. Robinson*, 20 Beav. 42 : *Woods v. Woods*, 4 Ha. p. 85 : *Talbot v. Marshfield*, 2 Dr. & Sm. 549 : (see these cases cited *post*) : *Mason v. Cattley*, 22 Ch. D. 609 : and see *ante*, p. 370, referring to *Radcliffe v. Fursman* and *Pearse v. Pearse*. If a case and opinion are properly stated and taken by a trustee for this purpose he has

a right to pay for it out of the trust estate; and that alone is sufficient to entitle the cestui que trust to see it: *Talbot v. Marshfield*, p. 551: and see *Woods v. Woods*, p. 85 and *Bacon v. Bacon*, 34 L. T. 349, where they were not charged to the trust: and see *Corp. of Bristol v. Cox*, *post*, p. 382.

But where the relation of trustee and cestui que trust is not established, or at all events where no *prima facie* case of such relation is made out, the party merely claiming to be a cestui que trust is not entitled to such discovery: *Wynne v. Humberston*, p. 424. In this case the legal advice had been obtained by the trustees for their guidance in respect of conflicting claims.

Where cases and opinions have been stated and taken by the trustees not for their guidance in the execution of the trust, but for the purpose of their own defence in litigation against themselves by the cestui que trusts, they are protected: *Talbot v. Marshfield*, 2 Dr. & Sm. 549: *Wynne v. Humberston*, 27 Beav. p. 423: and see *Adams v. Barry*, cited *post*, p. 388: even before the commencement of such litigation if in contemplation or anticipation of it: *Brown v. Oakshott*, 12 Beav. 252; *Deraynes v. Robinson*, 20 Beav. p. 43: but not where they were not stated to have been so taken in contemplation: see *Mason v. Cattley*, 20 Ch. D. 609, following *Talbot v. Marshfield*, *post*: and see generally *Reece v. Trye*, 9 Beav. 316: and *Bacon v. Bacon*, 34 L. T. 349.

In *Talbot v. Marshfield* the trustees had taken counsel's opinion as to whether they should exercise a discretionary power to advance part of the trust fund for the benefit of some of the cestui que trusts: others of the cestui que trusts filed a bill to restrain the trustees from exercising such discretion: thereupon the trustees took another opinion. The first case and opinion being stated and taken for their guidance in the execution of the trust (p. 550), the plaintiffs were held entitled to see them, for their interests would be affected by the exercise of the power: and in fact they were (p. 551) stated and taken for the benefit of all the cestui que trusts, for all were interested in seeing the trust property duly administered: but not the second, for they were stated and taken by the trustees to know in what position they stood and whether they should defend themselves.

Where cases and opinions had been stated and taken by the manager of a fund for the purpose of resisting certain claims by some of the subscribers to the fund to have a surplus refunded to them, others of the subscribers were held not entitled to inspect them in actions which they were bringing against the manager for the purpose of asserting similar claims: *Underwood v. Sec. of State for India*, 14 W. R. 551: 12 Jur. N. S. 321: the defendant was not in the position of a mere trustee, but it was sought to make him liable as he had already been made liable on similar claims. So in a similar

case of *Thomas v. Do.* 18 W. R. 312, for the opinions were not taken on behalf of the trust estate but on his own behalf to resist future litigation: and see *Adams v. Barry*, cited *post*, p. 358. In *Underwood v. Do.* the court refused to allow an affidavit to be used for the purpose of showing that the opinions had been circulated publicly amongst the persons interested therein and were therefore not confidential as had been sworn by the trustees: see as to this *ante*, p. 378.

In *Tugwell v. Hooper*, 10 Beav. 348, Lord Langdale held that a solicitor-trustee had no right to act exclusively for one cestui que trust but must rest in a situation of impartiality towards all, that he could not divest himself of his character of trustee, and therefore that neither he nor his client cestui que trust could withhold or keep secret from the other cestui que trust what had passed between them before the institution of the suit in respect of matters as to which there was a dispute between the cestui que trusts, and the solicitor who was a co-defendant with his client must produce the correspondence; but what passed subsequently was privileged, for it was necessary for him (qu. who?) to protect himself.

Where the cestui que trusts had mortgaged their interests to their solicitors cases and opinions stated and taken by the latter on behalf of the cestui que trusts were ordered to be produced, but not those stated and taken in their character of mortgagees: *Johnson v. Tucker*, 11 Jur. 382.

In an action brought by a cestui que trust against his trustee to set aside a purchase of the trust property made by the trustee thirty years previously, the latter setting up acquiescence was not allowed to see an opinion taken by the former fifteen years previously adversely for his own guidance after the dispute had arisen: *Woods v. Woods*, 4 Ha. 83.

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(b) *Other Cases* (see *ante*, p. 379).

In an action between a corporation and a ratepayer with regard to some matter relating to the raising or expenditure of the rates, the ratepayer would probably be entitled to see cases and opinions taken by the corporation on that subject, for the relation is that of trustee and cestui que trust, and the

ratepayer may be said to have contributed to pay for such cases and opinions: see Pearson, J. in *Corp. of Bristol v. Cox*, 26 Ch. D. p. 683.

See as to a husband and wife *post* (c).

Owing to the peculiar obligation of a tenant in relation to his landlord's property (see also *ante*, p. 279) the landlord (here a parish) was held entitled to inspect cases and opinions stated and taken by the tenant, as was considered, for the mutual benefit of both landlord and tenant: *A. G. v. Berkeley*, 2 J. & W. 291.

Cases submitted in relation to partnership affairs would not be privileged as against a partner: see *Pearse v. Pearse*, 1 D. G. & Sm. pp. 22—24, commenting on *Richards v. Jackson*, 18 Ves. 472.

A telegram sent by the defendants before dispute to a solicitor then acting for all parties was ordered to be produced in favour of the plaintiff in *MacFarlan v. Rolt*, L. R. 14 Eq. 580.

Where the same solicitor acts for both vendor and purchaser or mortgagor and mortgagee in a sale or mortgage, just as the privilege in respect of some of the matters connected therewith cannot be waived without the assent of both parties, see *post*, p. 427, so the one party cannot in respect of such matters assert the privilege against the other: see also *post*, p. 427.

Where a mortgagor and mortgagee employed the same solicitor, who afterwards became the transferee of the mortgage, it was considered by Stuart, V. C. that the solicitor could not in such a case set up a professional privilege so as to protect him from producing the documents prepared by him as such solicitor as if he had acted confidentially for one only of the parties, and in this case, which was a suit to set aside a foreclosure decree, the solicitor on this ground and also on other grounds, see *ante*, p. 260, was ordered to produce the mortgage deeds and transfers and papers in the foreclosure suit except briefs opinions and instructions for counsel: *Patch v. Ward*, L. R. 1 Eq. 436.

Where a professional man prepares a mortgage deed on

behalf of both mortgagor and mortgagee and is present at interviews between them as to the construction of the deed and the rights of both parties under it and not as the adviser exclusively of either of them, and after the last of such interviews a suit is commenced to set aside the mortgage, none of the communications between him and the mortgagee antecedent to the last interview are privileged from production to the mortgagor in that suit: Stuart, V. C. in *Ross v. Gibbs*, L. R. 8 Eq. 524—525.

In *Cleve v. Powell*, 1 M. & R. 228, the plaintiff called the subscribing witness of a bond who was the clerk of the attorney of both parties in the transaction of the bond and loan. Being asked in cross-examination what the plaintiff said to him at the time, it was held that as he was acting for both parties either of them had a right to the disclosure.

Where an arrangement had been come to between the plaintiff and defendant under which a suit was brought by the defendant in the name of the plaintiff, the latter in a subsequent suit against the former was held entitled to see a case and opinion stated and taken for the benefit of both of them, one being as much interested in the matter as the other, and also all the documents in the first suit, for he had a right to know what was being done in that suit: *Reynell v. Sprye*, 10 Beav. 50.

Communications sworn to be confidential (see *ante*, p. 378) between the defendant and his solicitor (co-defendant) with reference to a trust deed for the benefit of the defendant's creditors of which the solicitor was trustee were considered not privileged against the creditors in a suit to enforce its execution: *Pritchard v. Foulkes*, 1 C. P. Coop. 14.

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(c) *As to how far a Party relying on legal Advice taken by another Person but not on the Party's behalf is entitled to see it.*

Where a solicitor is employed on behalf of both husband and wife in order to effect a common object or purpose each

has an equal right with the other to inspect the documents coming into the solicitor's possession in relation to and during that employment and connected with the advice: *Warde v. Ward*, 3 M. & G. 365. In the court below, 1 Sim. N. S. 18, Lord Cranworth had come to a contrary decision considering on the answer, pp. 26—27, that the attorney was acting solely for the husband and that the mere fact that a party, even if a wife, relied on that advice made no difference unless he was attorney for both. But qu. as to this, if the advice was communicated to him in order to influence his action, see *ante*, p. 367. The documents in question were correspondence with the solicitor in the course of the preparation of a deed releasing the husband's estate from a charge in the wife's favour, the suit being by the wife to compel the husband to charge another estate in her favour in pursuance of an alleged promise to that effect.

In this case Lord Truro, p. 371, would have held if necessary that wherever husband and wife have distinct interests and the wife is induced to act under the advice of the attorney employed and paid by the husband, the attorney must be deemed to act as the attorney of both, and therefore each should have full inspection and production of all documents coming into the possession of the attorney during such employment and relating to the advice given to the wife.

Where communications had passed between the wife (deceased) and a solicitor relative to obtaining a Scotch divorce the plaintiffs representing the interest of the deceased husband were held entitled, as against the defendants representing the interest of the deceased wife, to inspect them as having passed for the mutual benefit of both husband and wife, but not those relating to an appointment subsequently executed by the wife which was being impeached in the suit: *Ford v. De Pontes*, 7 W. R. 299.

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(d) *As against a Party claiming under or in the same Interest as the Client.*

Parties claiming under the client can assert the privilege against parties claiming adversely to the client: see *Russell v. Jackson*, 9 Ha. p. 393: and *post*, p. 387.

But where the client is dead parties claiming under him cannot assert the privilege as against one another (but see *post*, p. 386). In the one case (see further as to this case *post*) the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interest: in the other case the question is to which of the parties claiming under the client the property belongs, and it would be an arbitrary rule to hold that it belongs to one of them rather than the other: *ibid.* p. 393: and see *Reynolds v. Godlee*, 4 K. & J. 88. And even where next of kin are claiming adversely to a will to set it aside: see *Phillips v. Holmer*, *post*: or to invalidate a bequest in it: *Russell v. Jackson*, *post*: they have been held entitled as against the executors to see or have disclosed in evidence communications between the testator and the solicitor and cases and opinions passing stated and taken in the course of preparing the will. See also in this connection a suit respecting a codicil in the Ecclesiastical Court, *Mackenzie v. Yeo*, 2 Curteis, 866.

The assent of the executor may be necessary where other persons hold the documents: see *Gresley v. Mousley*, 2 K. & J. 288, referred to *post*, p. 386: and *Chant v. Brown*, 7 Ha. p. 87 (except under the peculiar circumstances of *Feaver v. Williams*, 11 Jur. N. S. 902, referred to *ante*, p. 201): and perhaps also of the heir where the documents have relation to real estate: see *Doe d. Marriott v. Hertford*, 13 Jur. 632: 19 L. J. Q. B. 526.

The legal personal representative representing all the parties interested may show it to some of them though others of them are not before the court: *Phillips v. Holmer*, *post*.

In *Russell v. Jackson*, 9 Ha. 387, next of kin brought an action against the executors and residuary devisees and legatees for the purpose of invalidating a bequest as being made to them on a secret trust for an illegal purpose. Depositions of the testator's solicitor as to communications passing directly between

the testator, or indirectly through one of the executors and himself, relating to this trust were admitted: those which passed between himself after the testator's death and the defendants, on delivering to them the instructions as to the secret trust, were suppressed. The judgment of Turner, V.-C. is an interesting one in many respects. On p. 393 he suggests that if the privilege be one which follows the legal interest, as was contended, it must be subject to the incidents to which the legal interest is subject, and if the legal interest be subject to a trust the privilege must be subject to it also: and therefore to permit the defendants to avail themselves of the privilege would be to permit them by the use of the privilege to exclude the question whether they were trustees of it or not. Again on the same page he suggests that the rule being for the protection of the client, it cannot be for his protection that evidence should be rejected the effect of which would be to prove a trust created by him and to destroy a claim to take beneficially by parties who have accepted that trust. And on p. 392 he suggests that the existence of the illegal purpose would prevent any privilege attaching as where a solicitor is party to a fraud: see as to this *ante*, p. 355.

In *Phillips v. Holmer*, 15 W. R. 578, production was ordered of opinions, which had been taken by the executors in the course of an administration suit, in another suit brought by the next of kin to stay the administration suit, partly however on other grounds: see *ante*, p. 353.

In *Gresley v. Mousley*, 2 K. & J. 288, a suit by a devisee in remainder and heir to impeach a sale by the testator to his own solicitor, the parties claiming under the solicitor were compelled to discover confidential communications of the testator with the solicitor. It can hardly however be said that the proposition laid down (see *ante*, p. 385) by Turner, V. C. in *Russell v. Jackson* to the effect that there can be no privilege as between two persons claiming under the client is necessarily of general and unqualified application to every case where two parties claim under the client whether deceased or not.

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## VII. *As to the Privilege which can be asserted by Successors in Title to the Client.*

In spite of a suggestion of doubt in *Charlton v. Coombes*, 4 Giff. p. 380 (and see *Russell v. Jackson*, 9 Ha. p. 393, where Turner, V. C. says that the privilege does not in all cases terminate with the death of the party), it seems clear that the privilege is not in any respect diminished by the death of the client, and the only question is by whom the privilege may be asserted.

A successor in title to the client having such documents in his possession seems to be in the same position as the client himself in asserting the privilege (except as against persons claiming through the client under the circumstances discussed *ante*, p. 385): see *Jenkyns v. Bushby*, L. R. 2 Eq. 547: *Knight v. Waterford*, 2 Y. & C. pp. 35—36: *Minet v. Morgan*, L. R. 8 Ch. p. 362: *Mostyn v. West Mostyn Coal Co.* 34 L. T. p. 533: *Reynolds v. Godlee*, 4 K. & J. 88: *Ford v. De Pontes*, 7 W. R. 299: *R. v. Upper Bodington*, 8 D. & R. p. 732: *Doe d. Strode v. Seaton*, 2 A. & E. 171, cited *post*, p. 427: and see as to his consent being necessary to waive the privilege where the solicitor is under examination *Chant v. Brown*, 7 Ha. 79: 9 Ha. 790, referred to *post*, p. 427. (But where letters passed between a mortgagee's solicitor and the defendant or his solicitor on an assignment of the mortgage to the defendant, Fry, J. considered that the privilege was a personal one and did not extend to the defendant as claiming under the mortgage, distinguishing *Doe d. Strode v. Seaton* on the ground that there the solicitor was also acting for the purchaser, see *post*, p. 427; *Sutcliffe v. James*, 27 W. R. p. 751: 40 L. T. p. 876.) And even where the property in the documents does not properly pass to him, as was considered with respect to a book and map in *Doe d. Marriot v. Hertford*, 13 Jur. 632: 19 L. J. Q. B. 526, qu. whether in every case the privilege ought to be capable of waiver without his assent, for he is the person interested in that which is affected by it; see the argument *ibid.* p. 632: though if the client be deceased the assent of the personal representative may also be necessary: see *Chant v. Brown*, 9 Ha. p. 794, 796: and *Greenlaw v. King*, *post*.

In *Greenlaw v. King*, 1 Beav. 137, a suit to set aside an annuity as invalid, the defendant was assignee from a deceased bishop of the annuity. He was ordered to produce certain correspondence which had passed between the bishop and his solicitor, and a case and opinion of counsel stated and taken before the assignment respecting the validity of the annuity and in contemplation of its being impeached. It did not appear how the documents had come into his hands, but the argument seems to have been that as the solicitor had obtained them from the bishop it was the solicitor's duty not to disclose them as against the bishop, and that the defendant, who must have got them from the solicitor, was entitled to the same privilege as the solicitor (see as to this point *ante*, p. 367): in answer to this argument Lord Langdale observed that it did not appear how the documents came into the defendant's hands, that he might have obtained them from the bishop, and that if the solicitor

had performed his duty he ought not to have delivered them to the defendant without the assent of the bishop's executors. The question whether the defendant could not have claimed privilege (for the opinion at all events, if not for the other documents at that date, see *ante*, p. 369) in his own interest as assignee does not seem to have been discussed.

A surviving executor who had not acted in the testator's affairs was protected as defendant from production of cases and opinions stated and taken on behalf of the deceased executor relating to claims then made against him, and the same as those now being made against the defendant: *Adams v. Barry*, 2 Y. & C. C. C. 167.

A bankrupt's assignees or trustee could it is conceived in a proper case assert the privilege. But where assignees, plaintiffs, proposed to ask an attorney's clerk what the bankrupt had said to him when he came to consult him about the state of his affairs before his bankruptcy, and it was contended that the bankrupt was now represented by his assignees and therefore they had a right to waive the privilege, the evidence was rejected: *Boicman v. Norton*, 5 C. & P. 177.

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VIII. *As to what Documents may be regarded as Communications between the Client and his Professional Legal Adviser, and as to Communications or Documents standing on the same Footing (see ante, Section III. and post, Section X.).*

(a) *As to Oral Communications—as to the Client's Memoranda or Minutes of Oral or Written Communications or relating to the Matters on which the Advice is sought.*

The communications are protected whether oral or written: *Spenceley v. Schulenberg*, 7 East, p. 358: and see *Kennedy v. Lyell*, 23 Ch. D. pp. 403—404. In *Turton v. Barber*, L. R. 17 Eq. 329, the party was protected from answering whether certain obstacles in the way of granting a lease were suggested by him to his solicitor or by his solicitor to him.

The client's memoranda minutes or other documents containing a record of the communications are undoubtedly privileged (even if the proposition that privileged matter retained its privilege in whatever document it be found were not true absolutely and without qualification, as to which see *ante*, p. 366): for instance minutes in a company's books of communications between the company and their legal advisers or the result thereof: see *Woolley v. N. L. R. Co.* L. R. 4 C. P. 602, p. 604: and see *Greenough v. Gaskell*, 1 M. & K. p. 102.

But as to memoranda or minutes merely relating to the matters on which the advice is sought and not referring to or recording privileged communications, it is difficult to see how they can be protected, even if they have reference to litigation in which the client is or anticipates being involved: for a document is not privileged merely as having reference to the litigation, see *post*, p. 404. The opinion of Pearson, J. would however seem to be that they may be withheld from production. The following is an extract from his judgment in a recent case of *Corp. of Bristol v. Cox*, 26 Ch. D. pp. 681—682:—

“As to all those documents or minutes made by the committees of the corporation to whom the matters were referred, and which contain nothing more, as far as I can gather from the affidavit, and I may add also from the statement of counsel at the bar, than simply a record of proceedings which took place at the meetings of the committee with reference either to litigation which it was contemplated might take place, or to the litigation which did take place before, or to the litigation which is now in existence—whether the minutes relate to either one or the other of those matters, I am of opinion that those minutes are privileged. I conceive that any notes made by a man with reference to his own conduct in the litigation—simply notes made of his own \* opinions—are just as much privileged as the thoughts which pass through his mind, and I conceive, inasmuch as this corporation cannot in its corporate capacity either think or write or act except by certain machinery which is, so to speak, extraneous of itself, the corporation is perfectly justified in referring all these matters to a committee, and asking the committee to deal with them as it would deal with them itself, and they are simply the agents of the corporation for the purpose of considering what ought to be done, and their reports are confidential matters: and under those circumstances those matters are to my mind protected.”

As regards the documents which were here actually protected, it may also be suggested that they can stand on no better footing than communications between co-plaintiffs, which merely as such are not privileged: see *post*, p. 422.

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\* But the opinion of a non-legal agent is not privileged: see *Bustros v. White*, *post*, p. 417.

(b) *As to Documents accompanying the Communications.*

Where the communications are in the form of letters written by the client to his adviser or vice versa there is no difficulty. But in regard to documents accompanying the communications the question requires some consideration.

In *Wynne v. Humberston*, 27 Beav. p. 424, documents accompanying the case were said to be a part of it, for that a statement may be made to counsel through documents sent therewith. It does not appear what these documents were, but the reason hardly seems satisfactory. Unless the accompanying documents have been prepared by or by the direction of the party or his professional adviser for the purpose of being communicated by the one to the other the mere fact that they accompany or have been obtained for the purpose of accompanying, the communications cannot of itself (except under such special circumstances as are considered *post*, pp. 392—394) confer a privilege on them: see *post*, p. 391. And just as the documents themselves would not (except as above) be privileged, so neither would copies of or extracts from them be privileged (subject to a similar exception), so far as they were separable from the communication itself: see *post*, pp. 391, 394.

See as to documents prepared or obtained by the legal adviser for the purpose of communication to the client *post*, section (c).

Where a document has been prepared (as to documents obtained by him see *post* (c)) by the client for the purpose of communicating it to his solicitor it must stand on the same footing as an actual letter, for instance rough notes or memoranda for this purpose: see *Thompson v. Falk*, 1 Dr. p. 22.

That I think is the true principle that if a document comes into existence (as to “solely” or “merely” see *post*, p. 415) for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him to prosecute or defend an action then it is privileged because it is something done for the purpose of serving as a communication between the client and solicitor: Cotton, L. J. in *South-*

*wark, &c. Water Co. v. Quick*, 3 Q. B. D. p. 322. In this case a statement of facts drawn up by the chairman of the Southwark Company for submission to the solicitor for his advice in relation to the intended action was protected, p. 315, as well as other documents, see *post*, p. 418. But there seems no reason to question the soundness of the proposition so stated by Cotton, L. J. as being applicable (within limits, see *post*, p. 399) to the case of a document prepared by a third person at the direction of the client for the purpose of such communication, and not having reference to litigation existing or anticipated: see *post*, p. 399, referring to *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 648: see as to such documents prepared in reference to litigation, *post*, p. 415: and in particular by the party's agents, *post*, p. 417: see also *Westinghouse v. Midland R. Co.* *post*, p. 408.

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(c) *As to Documents prepared or obtained by (or by the Direction of) the Professional Legal Adviser for Communication to his Client or in order to enable him properly to advise his Client or conduct his Client's Business.*

As regards documents prepared or obtained by (or by the direction of) the professional legal adviser the privilege must equally attach whether they have been prepared or obtained for his own use or for the purpose of actual communication to the client.

Although as a general principle a document cannot acquire privilege merely by the use that is made of it, and therefore a document previously in existence or copy of or extract from such document cannot *primâ facie* be withheld from production on the ground that such document has been obtained or the copy or extract made for privileged purposes, under certain circumstances documents copies and extracts of this nature may acquire a privilege: (and see also a special case of *The Palermo*, *post*, p. 395).

They may acquire a privilege if they have been obtained or made by or by the direction of the professional legal



adviser. And the ground on which they can acquire privilege is that they cannot be produced without showing what was the view of the professional legal adviser as to his client's case or the advice which he had given him: they are the materials selected by his mind and represent the result of his professional care and skill: see *Lyell v. Kennedy*, 50 L. T. 730 (to be reported in the Law Reports, 26 or 27 Ch. D.) as cited *post*. These considerations therefore have no place where the documents copies or extracts have been obtained or made by the client (that is to say otherwise than under the solicitor's direction) for when a man will act for himself and will not do that which is the very ground of privilege, namely act by a solicitor, whatever he learns when the proper interrogatories are put to him he must produce or disclose: see Cotton, L. J. *ibid.* referring to *Wright v. Vernon* and *Storey v. Lennox*, *post*: though qu. whether they might not be protected if they could be brought within the description of materials for evidence: see *post*, p. 410, and *ante*, p. 361. It will be noticed that in all the cases *post*, the documents copies or extracts were obtained or made in reference to litigation: but the language in which the principles on which they should be protected are laid down seems wide enough to cover those obtained or made without reference to litigation: see also *ante*, p. 361, as to this point in reference to the disclosure by the client of information obtained for privileged purposes, and generally as to the analogy between a disclosure of that nature and production of documents of the kind now being considered. It will also be noticed that both in *Lyell v. Kennedy*, *Churton v. Freuden* and *Walsham v. Stainton*, the documents copies and extracts were obtained and made not by the solicitor personally but by his clerks agents or persons specially deputed for the purpose: as to how far this may entail the necessity of different considerations according as the work was done in reference to litigation or not, see *post*, pp. 401—402.

In *Lyell v. Kennedy*, *ante*, the defendant objected to produce "copies of entries in registers and public records and of other original documents which are not and have never been in my possession custody or control" and "photographs of tombstones and houses" on the ground that they were

made prepared or procured by his solicitors or their clerks or confidential agents instructed or employed by them for the purpose of defending him from the claims of persons who had commenced legal proceedings against him for the recovery of the hereditaments in question in the action and were made and procured solely for that purpose, stating the nature of these proceedings that he instructed his solicitors for the purpose of his defence in each case to make searches and inquiries and obtain copies of documents not in his possession in order to obtain the assistance of counsel and that the copies and photographs were made and procured in the course of such employment: among the documents were title deeds.

In that case, Cotton, L. J. says, "Now what ought we to do here? There is a litigation about pedigree and the heirship to a lady who died many years ago, and it is sworn by the defendant that, for the purpose of defending himself against various claimants, he has made inquiries, and that he has obtained every one of those documents for the purpose of protecting himself, and that he has not got them himself personally, but that his solicitors have got them for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. No case has been quoted where documents obtained under such circumstances have been ordered to be produced. In my opinion it is contrary to the principle on which the court acts with regard to protection on the ground of professional privilege, that we should make an order for their production. They were got for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps *publici juris* in themselves, to be produced; because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might show what his view was as to the case of his client as regards the claim made against him. There is no case, as I have said before, which is exactly in point; but *Walsham v. Stainton*, 9 L. T. Rep. N. S. 603; 2 H. & M. 1, though somewhat different in its circumstances, illustrates the principle to which I am referring. In that case Wood, V. C. protected the records and extracts from books which had been made for the defendants by an accountant who had collected together a number of entries, because the extracts, when put together, showed the view which he took, and which the solicitors of the defendant took of the particular fraud which they were there investigating; and to order the defendant to produce them would be not only giving production to the parties who were asking for production, but giving them a clue to the advice which had been given by the solicitor, and giving them the benefit of the professional opinion which had been formed by the solicitor, and those who had acted in a professional capacity for the defendant. In my opinion, therefore, in this case, without saying what ought to be done if there was any different case made before the court, with regard to documents like these, it would not be in accordance with the rules which have guided this court in deciding what is professional privilege in regard to the production of documents to order their production." So Bowen, L. J. "As to the documents, I agree with everything that has been said by Cotton, L. J. We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of his solicitor, and bearing in mind the rule of privilege which the law gives in respect to information obtained by a solicitor, it seems to me we cannot make the order asked for by Mr. MacClymont without doing very serious injustice. A collection of records may be the result of professional knowledge, research and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso; and, even if the solicitor has employed others to obtain them, it is his own knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have

disclosure of them without asking for the key which will unlock the treasure of labour which the solicitor has bestowed in obtaining them. I entirely agree therefore with what has been said. Without saying what ought to be done in another case, I am satisfied that in this case we could not make the order asked for without infringing on the principle on which the court acts: nor is it necessary to say what would be done as to any particular document if a right to inspection were made out."

Where by the direction of a solicitor a skilled person was employed to report on and make extracts from such ancient documents as he might think fit to support the client's case in order to enable the solicitor to advise the defendant on the evidence the whole of the report containing extracts or copies was held privileged on the ground that, although if the extracts or copies could have been separated from the observations and comments in the report, their production might have been ordered, in this case such separation being impossible the whole of the document must be protected: *Churton v. Frewen*, 2 Dr. & Sm. 390. So in *Walsham v. Stainton*, 2 H. & M. 1, an accountant was employed by the solicitor of the defendant company to investigate their books for the purpose of the litigation. It was held that though the books themselves were not privileged, yet the reports (one of them being made for the purpose of drawing the answer) were privileged even if they consisted only of extracts, for these extracts might have been made in such a form as to support some particular conclusion or inference at the solicitor's desire: a disclosure of the reports therefore was a very different matter from producing the books themselves: (see also observations of a similar character of Selborne, L. C. and Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. pp. 401, 404, 408, referred to *ante*, p. 361, and see *ante*, p. 393).

In *Wright v. Vernon*, 1 Dr. 344, protection was refused to extracts from parish registers showing the defendant's pedigree, which was in a great measure the same as the plaintiffs, obtained by the defendants (not by their solicitors, and explained on this ground by Cotton, L. J. in *Lyell v. Kennedy*, cited *ante*) for their defence in an ejectment action brought against them by the plaintiff in respect of the same property, though even if procured for this litigation it was said they must have been produced, p. 351, referring to *Story v. Lennox*, 1 M. & C. 525, as showing that information obtained by a party from strangers for the purpose of the contest was not privileged (but *qu. see ante*, p. 392), and also a pedigree obtained from the Herald's College (at the defendant's expense, see as to this *ante*, p. 299), but allowed to copies of a supposed pedigree made for the purpose of informing counsel in the ejectment action, what was the client's representation as to their own and the plaintiff's pedigree.

There is no rule that as soon as parties are in litigation or even in controversy upon those matters which become the subject of suit what each party gets for the purpose of the action is protected: *Churton v. Frewen*, 2 Dr. & Sm. p. 392: and see *Wright v. Vernon*, *ante*.

Documents undescribed were not protected as being procured by the solicitor since the institution of the suit and for the purpose of the defence, for they might be anything: they might have been procured from the British Museum or they might have been title deeds: *Balguy v. Broadhurst*, 1 Sim. N. S. 111.

In *Kennedy v. Lyell*, 23 Ch. D. p. 406, Cotton, L. J. (and see also p. 395, referring to *Felkin v. Herbert*, *post*), says "Cases such as *Balguy v. Broadhurst* seem to go on the ground that documents which the solicitor had obtained although in his employment as solicitor were, so to say, facts patent to the senses (see as to this *ante*, p. 362), and that as there was no ground of protection but that he had got them as solicitor for the purposes of the defence they must be disclosed: and see the same judge in *Lyell v. Kennedy*, cited *ante*, p. 392.

Suppose a defendant after the institution of a suit in searching for evidence or otherwise stumbles upon and gets possession of documents, not correspondence of the solicitor, but pre-existing documents which would establish the plaintiff's right beyond doubt, it could not be said that he got it since the

institution of the suit and for his defence, and he could not protect himself on that ground: *Felkin v. Herbert*, 30 L. J. Ch. p. 798, where protection was refused to documents said to have been obtained for the purpose of the defence since the institution of the suit and not to relate to or evidence the plaintiff's title (see as to the use of the word "title" in this connection, *post*, p. 501).

In the case of a plan it should be explained what it was and how it was made: *ibid.* p. 799: see further as to a map or plan *post*, p. 508.

See also *Cleave v. Jones*, cited *post*, p. 428, where contents of an account book made out and sent to the solicitor at his request by the client were protected.

A recent decision of Butt, J. (affirmed in the Court of Appeal but qu. on what grounds) in *The Palermo*, 9 P. D. 6, may perhaps be explained on considerations of this kind. There the defendants (the action being by the owners of ship R. against the owners of ship P. for damages by collision) applied for inspection of copies (stated to be in the possession of the plaintiff's solicitors for the purpose of advising the owners and for the purposes of the action and for their use therein) of depositions made by the master and crew of the R. relating to the collision under the Merchant Shipping Act, 1854, s. 432: (as to the depositions themselves see *post*, Chapter V.). The application was refused, Butt, J. saying, "Here discovery is sought of copies of certain depositions and these were obtained for the purposes of this action, and as the phrase is 'to form part of the brief.' Therefore I think they are privileged, and I shall not inquire for what purpose the original depositions were taken since it is the copies of which discovery is sought and which were obtained for the purposes I have stated." A copy of a document however is in no better position *quâ* privilege than if the document itself were obtained.

It would seem to follow to some extent from these cases, and see also *ante*, p. 360, discussing *Kennedy v. Lyell*, that reports prepared by the solicitor (or, within limits, by his direction, see *ante*, p. 392, and *post*, p. 401) containing information which he has collected for the purpose of enabling him to advise his client or conduct his client's professional business, whether in reference to litigation or not, would be within the privilege, although documents communicating the information to him from other persons than his client (and than by his direction, as *ante*) are not privileged: see *post*, p. 403, referring to *Wheeler v. Le Marchant*: unless the information has been supplied to the solicitor at his request for the purpose of litigation. That they would be protected where the information has been obtained for the purpose of litigation is clear: for they are privileged even when made by third persons at the solicitor's request, see *post*, p. 413. Reports of the results of the solicitor's inquiries made in contemplation of litigation in order to obtain evidence or materials for defending the party's title to an estate and resisting the claims that might be made against him were

considered privileged by Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. pp. 403—404: for the additional circumstance of their being handed or communicated to the client cannot affect the question, see *ante*, p. 391.

Subject to these considerations it should seem that all memoranda or writings of any kind made by the solicitor, whether for his own use in his client's business, or for the client's use, are within the privilege and stand in all respects on the same footing as actual communications between solicitor and client: see *Greenough v. Gaskell*, 1 M. & K. p. 101: and see *Warrick v. Queen's College*, 36 L. J. Ch. 505. In *Mostyn v. West Mostyn Coal Co.* 34 L. T. 531, rough notes made by the solicitors and their clerks seem to have been protected.

A bill of costs has been held privileged in the hands of the client: *Turton v. Barber*, L. R. 17 Eq. 329: and of the solicitor: *Chant v. Brown*, 9 Ha. 790: for, p. 794, it was the solicitor's history of the transaction in which he was concerned. See also *Flight v. Robinson*, 8 Beav. p. 40, where they were held privileged in the client's hands so far as they related to matters falling within the then (see *ante*, p. 369) restricted rule of privilege.

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(d) *As to Communications between the various Professional Legal Advisers of the Client.*

These communications seem to stand in every respect on the same footing as communications between the client and the professional legal advisers (see *ante*, Section VIII.).

Between solicitor and counsel: counsel's opinion: between partners in a firm of solicitors and between a partner and a clerk as to matters concerning which they were instructed by their clients: *Mostyn v. West Mostyn Coal Co.* 34 L. T. 531: between the solicitor and an avoué acting as the solicitor's agent abroad: *MacFarlan v. Rolt*, L. R. 14 Eq. 580: between the client and a Scotch solicitor also practising as

law agent in England: *Laurence v. Campbell*, 4 Dr. 485: between the town and country solicitor: *Hughes v. Biddulph*, 4 Russ. 190: between the solicitor and an attorney acting within a local jurisdiction such as the Lord Mayor's Court and employed for that purpose by the solicitor: *Goodall v. Little*, 1 Sim. N. S. p. 163: a case sent for the opinion, and the opinion of, a Dutch counsel: *Bunbury v. Bunbury*, 2 Beav. 173.

Draft pleadings: *Walsham v. Stainton*, 2 H. & M. 1: *Lamb v. Orton*, 22 L. J. Ch. 713: *Feaver v. Williams*, 11 Jur. N. S. 902.

Draft agreements: summary of an agreement being an agreement with notes alterations or cancellations made on it by way of advice: draft copies of lease with alterations and notes by counsel: *Mostyn v. West Mostyn Coal Co.* 34 L. T. p. 532: and see *Manser v. Dix*, 1 K. & J. pp. 453—454.

Briefs: *Walsham v. Stainton*: the solicitor's instructions even if only to consent and appearing on the back of the brief: *Nicholl v. Jones*, 2 H. & M. 588, p. 596.

Any matter of *publici juris* in the brief is not privileged: *Walsham v. Stainton*: *Nicholl v. Jones*: for instance copies of the pleadings in another action: *Lamb v. Orton*, p. 714. Where matter of this kind cannot be obtained in another form production of such parts of the brief will be ordered with liberty to cover up any observations or marks: *Walsham v. Stainton*.

Counsel's indorsement on a brief is not a confidential communication: it is the note on which the court frequently acts and is equally *publici juris*: *Nicholls v. Jones*, p. 595. Its production will be compelled where necessary as in the case of an order in the Probate Court which does not state the parties who appeared: *ibid.* pp. 595—596: or in the case of a compromise indorsed on the brief and not stated in public or made an order of the court: *Plumley v. Horrell*, W. N. 68, p. 240: with liberty to seal or cover up every part which does not relate to the order: *Nicholls v. Jones*: (and see *Bullock v. Corrie*, 3 Q. B. D. p. 358, where it was suggested in argument that an agreement for compromising an action,



as in *Hutchinson v. Glover*, 1 Q. B. D. 138, was in the nature of a judgment and therefore *publici juris*).

Shorthand writer's notes of what was said in open court must be produced though employed by one of the parties, any other matter therein being covered up: *Nicholl v. Jones*. But in a recent case of *Nordon v. Defries*, 8 Q. B. D. 508, where the plaintiff had procured shorthand writer's notes to be taken of the proceedings in another action in which he was defendant for the purpose amongst others of this litigation, copies of the notes were protected; qu. as to the soundness of this decision. So in *Rapson v. Cubitt*, 7 Jur. 77, a bill to set aside a compromise of a previous action between the same parties, Knight Bruce, V. C. refused to order production by the defendant of a transcript of shorthand writer's notes of the evidence in the action, considering the application to be a novelty.

In *Gandee v. Stansfield*, 28 L. J. Ch. 436: 5 Jur. N. S. 778 (also reported 7 W. R. 297, but qu. whether accurately) Lord Romilly considered that proceedings in the same matter before either a court of law or a commissioner in bankruptcy, or depositions before Inclosure Commissioners on a question of disputed boundary, must be produced. The actual decision, which dealt with office copies of examinations in bankruptcy, was partially reversed, see *post*, p. 412; but these examinations are secret and not *publici juris*; that particular ground for production therefore does not exist in their case: see also *post*, p. 409.

In *Tyas v. Brown*, 42 L. T. 501: 27 W. R. 575, Malins, V. C. ordered production of briefs and shorthand notes of proceedings in lunacy in reference to an agreement the subject of the action in order to see whether the defendant's counsel on that occasion represented her in her own right as well as in the capacity of committee, and whether her own interest in the property as well as that of the lunatic was bound by the agreement, the defendant alleging that she appeared only as committee and that her own interest was not bound.

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(e) *Where a third Party is the Medium of Communication or prepares the Communication on the Client's behalf.*

Where a third party is only the medium of communication between the client and the professional adviser, that is to say where he is only the agent or representative of either to make or receive the particular communication, it is clear that the privilege is co-extensive with that which obtains where the communication passes directly: *Russell v. Jackson*, 9 Ha. pp.



390—391 : *Wheeler v. Le Marchant*, 17 Ch. D. pp. 682, 684 : Mellish, L. J. in *Anderson v. Bank, &c. post*, p. 407 : *Reid v. Langlois*, 1 M. & G. pp. 638—639 : *Walker v. Wildman*, 6 Mad. 47 : *Carpmael v. Powis*, 1 Ph. 687 : *Mackenzie v. Yeo*, 2 Curteis, pp. 874—875 : *Mostyn v. West Mostyn Coal Co.* 34 L. T. p. 532 : *Marriott v. The Anchor, &c. Co.* 3 Giff. p. 307 : *Hooper v. Gumm*, 2 J. & H. p. 607 : *Bunbury v. Bunbury*, 2 Beav. p. 176 (where protection was refused as they were not professional communications). The privilege includes not only communications made to the professional agent himself by the client directly but all communications made by the client to the solicitor through intermediate agents, either by employing a third person to write letters or by sending letters through or giving verbal messages to him to deliver to the solicitor : see Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 649. So where the client requests his agent (see *post*, p. 416, as to an agent) to draw up a case for the opinion of his solicitor or counsel that is a confidential communication for that purpose : *ibid.* p. 648 : or to make rough notes for the case to be laid before the legal adviser, see *Fenner v. S. E. R. Co.* L. R. 7 Q. B. p. 771, *post*, p. 420 : and see *ante*, p. 391, referring to *Southwark, &c. Co. v. Quick*. But this proposition must not be extended in its application so as to embrace every document prepared by a third person by the client's direction with the object of communicating it to the solicitor, for *Wheeler v. Le Marchant* (see *post*, pp. 401, 403) having established that a report made by a third person to the solicitor at his request is not protected unless in reference to litigation, it is difficult to see how a report made by a third person to the client by the client's immediate direction but at the solicitor's request can be in any better position.

The privilege does not rest on the absolute necessity of employing an intermediate agent. It exists equally whether such employment was necessary or not : *Reid v. Langlois*, 1 M. & G. pp. 638—639. In *Carpmael v. Powis*, 1 Ph. p. 693, Lord Cottenham held this to be so where the solicitor (or the client, referring to *Walker v. Wildman*) was being examined, but doubted how it would be where the intermediate agent

was being examined: but qu. see *post*: and in *Hooper v. Gumm*, 2 J. & H. 602, Lord Hatherley, pp. 605—606, considered that *Reid v. Langlois* established that the privilege only obtained where it was reasonable to employ an agent as a channel of communication as for instance where a party abroad employed his agent in England to communicate with his solicitor. But qu. whether that is the effect of *Reid v. Langlois*.\*

The privilege embraces the letters sent by the client to the agent for the purpose of their being communicated to the solicitor: *Hooper v. Gumm*: Mellish, L. J. in *Anderson v. Bank, &c.* *post*, p. 407: the communications between the agent and the solicitor: *ibid.* p. 607: *Reid v. Langlois*, 1 M. & G. p. 649: *Mackenzie v. Yeo*, 2 Curt. 866, pp. 874—875: and those from the agent to the client if stated to have been sent in consequence of communications from the solicitor: *Hooper v. Gumm*, p. 607.

The confidential and professional character of the contents of the letters from the client to the agent must of course be definitely stated: *Hooper v. Gumm*, 2 J. & H. p. 608: *Bunbury v. Bunbury*, 2 Beav. p. 176: as in the case of any communications directly with the solicitor.

In *Original Hartlepool Colliery Co. v. Moon*, 30 L. T. 193, communications between the person who acted as managing agent of an old lady and her solicitor were treated as passing between solicitor and client. So in *Macfarlan v. Rolt*, L. R. 14 Eq. 580, p. 582, communications between the agent of the defendants and their solicitor.

Where an interpreter was employed for the purpose of enabling the client and solicitor to communicate he was protected as witness from disclosing what passed during the interview: *Du Barre v. Livette*, Peake, 108.

Where the solicitor communicated with a person whom he said he considered to be and treated as his client's agent he was protected as witness from disclosing the communications: *Carpmael v. Powis*, 1 Ph. 687.

In this case Lord Cottenham, p. 693, refused to give an opinion as to what would be the case if the intermediate agent were being examined. But it is conceived that on principle it should make no difference. And see *Du Barre v. Livette*, referred to above: and *Marriott v. The Anchor, &c. Co.* 3 Giff. p. 307. In Phill. Evid. p. 107, it is laid down that the person who acts as interpreter or agent or organ of communication between attorney and client stands in precisely the same position as the attorney himself. And so in Tayl. Evid. p. 820.

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\* Both in *Hooper v. Gumm* and *Reid v. Langlois* the communications passed in reference to litigation: but it is not conceived that this involves any distinction: see the other cases referred to *ante*.

Where a defendant went to a person, not an attorney nor pretending to be one, to get a conveyance prepared, and this person wrote to a relation, an attorney, who told him that the defendant could not convey, and he communicated this to the defendant, it was held not a privileged communication: *Doe d. Pritchard v. Jauncey*, 8 C. & P. 99.

Where a prisoner in custody wrote to a friend to ask him to inquire of G. or of any other solicitor whether the punishment of forging a bill was the same where the names of the parties were entirely fictitious as where they were real persons, it was held not a privileged communication, for the relation of attorney and client did not exist then or afterwards between the prisoner and G., and it was not even limited to G.: it was merely asking a friend to find out what was the law on a particular point: *R. v. Brewer*, 6 C. & P. 363.

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(f) *Where a Third Person acts as the Clerk or Agent (in a limited sense) of the Professional Legal Adviser.*

See as to a shorthand writer's notes of a trial *ante*, p. 398.

Under certain circumstances a third party may be regarded as so doing the work of the solicitor as to stand in the position of the solicitor himself. But this proposition must be very carefully limited. The expression "doing the work of the solicitor" has been used in so wide a sense as to cover the case of any person making reports for or to the solicitor by his direction: see *post*, p. 415: see also *ante*, p. 392, citing *Lyell v. Kennedy*. In this extended sense the proposition is true only where the work is done in reference to litigation. The point was expressly decided in a recent case of *Wheeler v. Le Marchant*, 17 Ch. D. 675, before the Court of Appeal.

In this case the defendant sought to extend the rule of privilege so as to cover all communications made to the solicitor by third parties on the ground that they, see pp. 680—682, contained information required or asked for by the solicitor for the purpose of enabling him the better to advise his client. And protection was expressly refused on the ground that they were not prepared in reference to litigation existing or contemplated: (as to a report prepared by the solicitor containing such information see *ante*, p. 395). "The solicitor being consulted in a matter as to which no dispute has arisen

thinks he would like to know some further facts before giving his advice and applies to a surveyor to tell him what the state of a given property is. . . . To give such protection would not only extend the rule beyond what has been previously laid down but beyond what necessity warrants": Jessel, M. R. p. 682. Nor could these surveyors be regarded as intermediaries: for although employed on behalf of the defendants to do certain work and in a sense representatives, they were not employed to communicate with the solicitor for the purpose of obtaining legal advice; their communications were not communications between the client by his representatives and the solicitor: see Cotton, L. J. p. 684.

The only case which was considered to lend any support to the contention was a case of *Wilson v. Northampton, &c. Co.* L. R. 14 Eq. 477, where correspondence between the company's solicitors and the engineers and other officials and agents of the company in reference to a contract to make a station, specific performance of which was being sought in the action, was protected. On this case Brett, L. J. observes that there were probably some documents shut out from production which were of such a character that if the decision really intended to shut them out it might give colour to the contention of the defendant, but that if it was so the decision was wrong. But qu. whether the engineers officials and agents were not representatives of the company for this purpose.

It is clear then that the proposition must be restricted to those cases where the third party is really pro hâc vice the solicitor's clerk, or perhaps (see *Lyell v. Kennedy*, ante, pp. 392, 393) his confidential agent. In two cases of *Walsham v. Staunton* and *Churton v. Frewen* (discussed ante, p. 394) there are dicta which seem to lay it down too broadly.

In the former case, p. 4, Lord Hatherley says, "The principle is established that where a person has occasion to employ a solicitor and the solicitor in order to enable himself to advise on the matter calls in some other person to assist him and give his opinion such communications are as much privileged as if they come from the solicitor himself. In such a case the person called in (here it was an accountant) is pro hâc vice the solicitor's clerk." And, p. 6, "I see no distinction of principle between accounts prepared by an accountant employed by a solicitor, and those prepared by the solicitor himself. It is the case of a solicitor employing a confidential agent."

In the other case, p. 393, Kindersley, V. C. says, "Suppose the person who has made the communication is not the solicitor but his clerk it is held that that case also comes within the same principle. Then going a step further suppose that the person is as in the present case neither the solicitor nor his clerk but a skilled interpreter of ancient documents employed by the solicitor because he could not so effectually do the work himself, that case would stand on the same footing as the case of the solicitor or his clerk."

In each of these cases the reports were as a matter of fact made in reference to litigation. It might perhaps be argued that according to *Wharler v. Le Marchant*, they could not have been held privileged unless so made. But - qu. see ante, p. 392, referring also to *Lyell v. Kennedy*.

IX. *Where the Facts go beyond the intervention of a Third Person in the preparing making sending or receiving Documents or Oral Communications in the Capacities considered ante, Sect. VIII. sub-sects. (e) and (f).*

There does not seem to be any case of authority in which the client has been allowed to claim privilege for documents or communications of this character not having come into existence or passed in reference to anticipated or actual litigation. There certainly does not seem to be à priori any reason why if privilege be allowed to documents containing information obtained for the purpose of enabling the solicitor to advise as to the defence or prosecution of an action and for which protection could not be claimed as being materials for evidence, the same privilege should not also be allowed to documents containing information obtained by the solicitor in order to enable him to give his client legal advice on matters not connected with litigation. However such is the rule. See *Wheeler v. Le Marchant*, referred to *ante*, p. 401.

Answers to inquiries made by the party or his solicitor of a third person are not privileged merely as having reference to the subject-matter of the litigation, but the documents must have passed between these persons with a view to anticipated litigation, and for the purpose of enabling the person to carry it on successfully: see Brett, M. R. in *M'Corquodale v. Bell*, 1 C. P. D. p. 476.

In a common law action, *London Gaslight Co. v. Chelsea*, 6 C. B. N. S. 411: 28 L. J. C. P. 275, protection was refused to documents containing the results of experiments made by the defendants as to the gas supplied to them by the plaintiffs, but not being proofs for the purpose of the litigation, p. 424: (see further as to this case, *post*, p. 514). Letters passing between a party's architect and principal witness and the party's solicitor, some before and some after dispute arisen, were not protected though stated to be of a confidential character, and to have reference to the questions in the suit, not being alleged to contain the party's evidence or to be in contemplation of the suit: *Page v. Wood*, 17 W. R. 435.

Where in an action by an incumbrancer against a person claiming to be a purchaser for value without notice of the incumbrance the plaintiff sought the production by the defendant of communications between his solicitor and the solicitor of the vendor on the occasion of the purchase in order to prove notice, the documents were ordered to be produced on the ground that they were not written in anticipation of the claim raised in the suit: *Paddon v. Winch*, L. R. 9 Eq. 666.

See also *post*, p. 440, referring to *Bramwell v. Lucas*, as to questions by the client of his solicitor for information as to matters of fact and answers thereto, and generally *post*, p. 432, as to communications to solicitors from collateral quarters.

X. *As to Documents or Oral Communications having reference to or connection with Litigation then existing or anticipated (see ante, Sect. IX.) not being Communications directly between the Client and the Professional Legal Adviser or Communications or Documents standing on the same footing (the subject of Sect. VIII. ante), that is to say, Documents or Oral Communications in the preparing making sending or receiving of which some Person other than the Client or his Professional Legal Adviser is concerned and is acting otherwise than in the limited and special Capacities discussed ante, Sect. VIII. subsects. (e) and (f).*

(a) *As to Documents or Communications of this nature which are not privileged.*

As to documents previously in existence or copies of or abstracts from them obtained or made for the purpose of litigation, see *ante*, pp. 391—395.

Documents prepared since dispute in contemplation of litigation were not, as such, privileged: *Maden v. Veecers*, 7 Beav. 489: nor are they now, see *post*.

There is no such law as that every communication made by a person to a party with a view to litigation in which that party is or is about to be engaged is protected whoever the person is: see James, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 656: see also *Fenner v. S. E. R. Co.* referred to *post*, p. 420.

Some of the dicta in *Ross v. Gibbs*, L. R. 8 Eq. 532, were made use of by counsel in *Anderson v. Bank*, &c. in order to support an extension of the privilege to all communications between a party and an unprofessional agent in anticipation of or in reference to litigation and with a view to the prosecution or defence as the case might be. But Jessel, M. R. in his judgment in this case, and also James, L. J. p. 656, strongly disapproved and expressly decided against any such extension: nor in fact was it considered that the judgment in *Ross v. Gibbs* warranted the inferences that were drawn from it, that the Vice Chancellor did not intend to go beyond the previous authorities, and that he evidently considered that the agent whose communications were held to be privileged had been sent out to consult the legal advisers and act under their direction in collecting evidence, &c.: see *ibid.* pp. 652—653, 656: and *post*, p. 413: and see *post*, p. 416, as to communications with agents.

It must be considered therefore that the rule was laid down too broadly by Brett, M. R. in *M'Corquodale v. Bell*, 1 C. P.

D. p. 479 (and see also p. 476, "questions asked and answers given with a view to anticipated litigation and for the purpose of enabling a party to carry on such litigation successfully"), where he includes within the privilege all documents brought into being with a view to the conduct of litigation either already commenced or anticipated, and by Lindley, L. J. p. 481, "documents obtained by a party or his solicitor with a view to and in contemplation of litigation either pending or anticipated though received from persons unconnected with the litigation," although the actual decision seems unquestionable, the communications being between the solicitor and a third person and therefore within the proposition stated *post*, p. 406.

Qu. as to the decision in *Theodore Korner*, 3 P. D. 162. There, professing to follow *Southwark, &c. Co. v. Quick* (see *post*, p. 418), the Court of Admiralty refused to order production of two reports made by surveyors before action brought at the plaintiffs' request to ascertain the cause of damage to cargo of which they were consignees, and which the plaintiffs objected to produce on the ground that they were documents written and prepared solely for the purpose of proceeding in this action. *Southwark, &c. Co. v. Quick* however does not establish this ground as of itself sufficient, see *post*, p. 415: and the documents which were prepared for a similar purpose in *M'Corquodale v. Bell* were obtained by the solicitors, see *ante*.

In *Martin v. Butchard*, 36 L. T. 732, the purchaser of a ship bringing an action in respect of alleged imperfect construction was compelled to produce two reports, one made before the other after the action was commenced, and (as described in the affidavit) "obtained for the plaintiff's guidance and relating exclusively to his own case and not in any way making out the defendant's case," following *Bustros v. White* commented on *post*, p. 417: (as to whether the latter ground was not sufficient to protect it, see *post*, p. 485.)

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(b) *As to Documents or Communications of this (see heading of this Sect. X.) nature which are Privileged.*

Such a document to be privileged must (unless obtained, or, if a copy or extract, made, under the special circumstances discussed *ante*, p. 391) have come into existence or been (confidentially, see *Wheeler v. Le Marchant*, *post*, p. 414) prepared, if a document, or passed, if an oral communication, after litigation commenced or in view of anticipated (see *Westinghouse v. Midland R. Co.* and *Kennedy v. Lyell*, *post*, p. 408) litigation, (as to "solely" or "merely" see *post*, p. 415), either for the purpose of obtaining evidence to be used in



such litigation, or information which might lead to the obtaining of such evidence: see Jessel, M. R. in *Wheeler v. Le Marchant*, 17 Ch. D. p. 681: or information as to the evidence which could be obtained: see Mellish, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 659: or in order to supply the proof to be inserted in the brief: *Fenner v. S. E. R. Co.* L. R. 7 Q. B. 767, pp. 771—772, referred to *post*, p. 420: *London Gas Light Co. v. Chelsea*, 6 C. B. N. S. 411: or as materials or information for the brief: *Anderson v. Bank of British Columbia*, p. 656: *Southwark Water Co. v. Quick*, 3 Q. B. D. 315, p. 320, (regarded by Brett, L. J. in this last case as equivalent to “for the purpose of being laid before the solicitor,” see *post*, p. 418, but *qu.*): or under the advice or direction of the solicitor for the purpose of enabling him to conduct the litigation or advise his client in reference thereto: see Jessel, M. R. in *Anderson v. Bank of British Columbia*, pp. 649—650, 652—653: for the purpose of giving advice or obtaining evidence in reference to existing or contemplated litigation: see *Wheeler v. Le Marchant*, *post*, p. 414: or at his instance and for his use for such purpose: *Southwark, &c. Co. v. Quick*, pp. 319, 322, referring to *Friend v. L. C. and D. R. Co.* 2 Ex. D. 437: or for the purpose of being submitted to him for such purpose: *Southwark, &c. Co. v. Quick*, p. 322.\*

The various cases believed to bear out these propositions are discussed *post*, sub-sects. (1) to (6): and see in particular as to reports of agents *post*, p. 416, and communications between co-plaintiffs and co-defendants, *post*, p. 422.

(1) *As to distinguishing between the Protection attaching to Materials for Evidence and the Doctrine of Professional Privilege.*

There are two different points of view from which the subject has been regarded or rather perhaps two different tests which have been applied. In some cases and by some

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\* No reliance must be placed on the words in which protection was claimed in *Norton v. Defries*, 8 Q. B. D. 508, as will be seen from the report of the judgment. *Qu.* also as to minutes relating to the conduct of litigation held privileged in *Corp. of Bristol v. Cox*, *ante*, p. 389.

judges the question has been as to whether the person concerned in the preparing sending or receiving the documents or oral communications could be considered as performing duties which properly devolved upon the professional adviser: in other cases and with other judges the question has been whether the documents or oral communications could be considered as evidence or materials for the brief or rough notes for such evidence or materials. The former view has been perhaps generally dwelt upon by equity judges, the latter view principally in the common law courts: see James, L. J. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 656: and cases referred to *post*, pp. 416, 420. Now the principles underlying these views are different. Professional privilege rests on the impossibility of conducting litigation without professional advice, whereas the ground on which a party is protected from disclosing his evidence is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice. No doubt as a rule evidence obtained for the purpose of litigation is usually collected directly or indirectly by a solicitor, still there might be evidence or materials therefor of which it could not be said that it had been so collected (as to which see *post*, p. 410). Again no doubt the communications which pass in anticipation of or pending litigation usually pass in the course of getting up evidence, as seems to have been assumed by Romilly, M. R. in *Simpson v. Barnes*, 33 Beav. 482, in respect of letters written by and to a third person to and by the solicitor in anticipation of or pending the suit, still there are communications undoubtedly privileged to which it might be difficult to assign the character of evidence or of materials for the brief. And in fact in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 658, Mellish, L. J. distinguishes between what he calls the two classes of privilege, namely, first the rule that a man is not bound to disclose confidential communications made between him and his solicitor directly or through an agent who is to communicate them to the solicitor, and second the rule that a party is not bound to communicate evidence which he has obtained for the purpose of litigation. So in *Llewellyn v. Bad-*

*deley*, 1 Hare, p. 532 (referred to *post*, p. 411), Wigram, V. C. considered that documents of this character might be privileged without calling in aid the doctrine of professional confidence. So Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. p. 404, after referring to the doctrine of professional privilege says, "There is also another principle that no one is to be fettered in obtaining materials for his defence, and if he for the purpose of his defence obtains evidence the adverse party cannot ask to see it before the trial. I do not think this principle applies here but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor." Neither view therefore by itself seems complete and sufficiently inclusive.

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(2) *After Litigation commenced or in view of anticipated Litigation* (see *ante*, p. 405).

There must be some definite prospect of litigation and not a mere vague anticipation of it.

In *Westinghouse v. Midland R. Co.* 48 L. T. 98, on app. 462, the defendant company claimed protection for letters and reports written by their officials and advisers with a view to possible litigation, and in the event thereof to be submitted to the solicitors, and ultimately so submitted. In a further affidavit by one of the solicitors it was stated that a letter had been addressed to the secretary of the company by the plaintiff which was taken to be an intimation that the plaintiff intended to proceed against them for infringement of his patent, that this letter was handed to the solicitors with instructions to advise the company as to the merits of the plaintiff's claim, that ever since the matter had been conducted with a view of getting materials for a contest if necessary: that none of the correspondence would have taken place in the ordinary course of the business of the company, and it arose only in consequence of the claim and the necessity of meeting it. It was held by Bacon, V. C. and by the Court of Appeal that the letter did not amount to a threat of litigation, and by the Court of Appeal that even if it did, the affidavits were not of that certain character necessary to a claim for privilege; they did not specify what litigation was expected or that the documents submitted to the defendants' solicitors were submitted in consequence of the advice given to the defendants; that it was only in case there should be future litigation they were to be so submitted.

Reference may also be made to the law formerly obtaining as to communications between client and solicitor not containing legal advice and the distinction then existing between dispute having arisen and not having arisen: see *ante*, p. 368. And see also *Corp. of Bristol v. Cox*, 26 Ch. D. p. 683, as to when Pearson, J. considered there was *lis mota*: and *ante*, pp. 359, 393, referring to *Lyell v. Kennedy*, and *Kennedy v. Lyell* (claims to an estate).

The litigation which is anticipated need not, it is conceived, be the particular litigation in which the discovery is being sought, but may be other litigation, either with the same or other persons, and either involving the same or different subject-matter or questions.

In a recent case *Pearce v. Foster*, 15 Q. B. D. 114: 52 L. T. 886, where privilege was allowed for documents prepared for a previous action, Brett, M. R. considered (pp. 119, 120) that, the reason of the privilege being to ensure free communication between solicitor and client, such freedom would be impaired if at any time or under any circumstances such communications were subject to discovery, and that the liability to discovery in a subsequent action would have this effect as well as in the original action. In this case it seems the documents would have been privileged independently of any litigation, being documents prepared by the solicitor for the purpose of confidential communication between counsel, solicitor and client, or "professional" documents as defined by Bowen, L. J. As to these documents, the judgments in this case seem to establish that the rule "once privileged always privileged" applies without exception, there being no such limitation as that the litigation must involve the same subject-matter or questions, as seems to have been considered in some old cases: see *ante*, p. 371: and in fact the proposition laid down by the author with reference to such documents (*ante*, p. 371) was expressly approved by Brett, M. R. The reasoning of Brett, M. R. might be applied to other classes of privileged documents: however, Bowen, L. J. expressly refused to lay down the proposition that "once privileged always privileged" applied to all classes of documents, having perhaps in his view the class of documents referred to *ante*, p. 407, as being distinguishable from professional documents.

Though a passage in the judgment of Cotton, L. J. in *Wheeler v. Le Marchant*, 17 Ch. D. p. 615, is so worded as to confine the privilege to litigation with the particular adversary, the general tone of the judgments in that case is in accordance with the above proposition without any limitation at all. In *Kennedy v. Lyell*, 23 Ch. D. 387, discussed *ante*, p. 359, see pp. 391, 400, 403, 407 (Cotton, L. J. being one of the judges), information obtained in contemplation of litigation for the purpose of obtaining evidence or materials for defending the party's title to resist claims that might be made against his estate, and not in view apparently of the particular litigation in question, was treated on the same footing as if obtained in respect of the particular litigation: and see *ante*, p. 393, discussing *Kennedy v. Lyell*. In *Bullock v. Corrie*, 3 Q. B. D. 356, damages had been recovered from the plaintiffs for detention of a ship by the shipowners: correspondence between the plaintiffs and their solicitors (and apparently also between the latter and the shipowners' solicitors; but qu. for it would not be privileged at all, being between the solicitors of opposite parties, see *post*, pp. 433, 434) in the course of that action were held privileged in a subsequent action brought by the plaintiffs to recover the sum so paid in damages from the defendants, on the ground that they would have been privileged in the first action, the rule being, according to Cockburn, C. J. p. 358, once privileged always privileged; and *a fortiori* where the two actions or the facts in them were substantially the same: but qu. see *ante*, p. 371. In *Nordon v. Defries*, 8 Q. B. D. p. 510, it was considered that where documents were privileged in one suit they should also be privileged in another suit arising out of the same subject-matter, and therefore that where protection was claimed for documents as having come into existence for the purpose amongst others of the action, it being evident that the other purposes were other litigation, it was sufficient, for they would have been privileged in that litigation: see further as to this case *ante*, p. 398.

(3) *For the Purpose of obtaining Evidence or Information relating thereto or Materials, &c.* (see *ante*, p. 405).

It is pointed out *post*, p. 477, in discussing the application to production of documents of the principle that a party is not compelled to discover the evidence of his case, that it is necessary to separate the consideration of documents constituting in themselves evidence for the party from those which only contain the evidence that may be used orally at the hearing. As to documents of the former kind, to entitle them to protection they must evidence exclusively the party's own case, and if they contain any matter which might tend to support the opponent's case they must be produced. But as to documents of the second kind, such as are now under consideration, no such restriction as to the effect of the matter contained therein in supporting the opponent's case obtains. They might wholly tend to support the opponent's case and yet they are protected. In *Llewellyn v. Baddeley*, 1 Hare, p. 532, Wigram, V. C. seemed to consider that the protection given to documents of this character depended on the view that they supported the party's case as was there sworn, and refused to give an opinion as to what his decision would be if it appeared that the document in question negatived the party's case. But this cannot be. No doubt such documents just as any other documents are protected if they can be said to relate exclusively to the party's own case and to contain nothing impeaching it or supporting the adversary's case, see *post*, p. 485.

Where the evidence or information has been procured by the client under the direction of the solicitor it stands on the same footing as if it was procured directly by the solicitor and is clearly privileged, see *post*, p. 413: the client is for this purpose the quasi-agent of the solicitor: see *Jessel, M. R. Anderson v. Bank, &c.*, 2 Ch. D. p. 650: and *post*, p. 415.

So where it has been procured for the purpose of communication to the solicitor: see *ante*, p. 391: and *post*, p. 415: but see as to reports from a party's agents *post*, p. 417.

Where it cannot be said to have been so procured (for instance he may be acting without a solicitor, see *Storey v. Lennox* and *Anderson v. Bank of British Columbia, post*), it is conceived that on principle it should be protected as being materials for evidence, see the references *ante*, p. 406: although, as said by Cotton, L. J. in *Lyell v. Kennedy*, cited *ante*, p. 362, and see *ante*, p. 392, if a man acts for himself and does not employ a solicitor he cannot protect that which if he had employed a solicitor would be protected (or "he must produce or disclose whatever he learns," but *qu.*).

The following are the principal authorities bearing on the point.

In *Storey v. Lennox*, 1 M. & C. 525, p. 537, Lord Cottenham refused to give any opinion whether a person acting for himself without a professional adviser and corresponding with others with a view to actual or expected litigation ought to be equally protected against being compelled to reveal the result of his enquiries: and see *ante*, p. 392, referring to this case and *Lyell v. Kennedy*. In *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 658, Mellish, L. J. says, "Now in determining to what extent the latter privilege (evidence obtained for the purpose of litigation) goes and whether it is confined to cases where a solicitor is employed or extends to cases where a man acts as his own solicitor, some very nice questions may arise, particularly when the evidence is not obtained for the direct purpose of being given in the action but is obtained before the action is commenced or before the defence is pleaded in order that the party who seeks it may obtain information for the purpose of determining whether he will defend the action or commence an action." And his opinion evidently was that information obtained by a party even before action actually determined on (for instance in the case of a collision from the passengers and crew) respecting the evidence which could be given by certain persons should be protected, except in the case of an agent under the circumstances considered *post*, p. 416. See also observations of Blackburn, J. in *Fenner v. S. E. R. Co.* L. R. 7 Q. B. 771, referred to *post*, p. 420: of Cockburn, C. J. in *Chartered Bank of India v. Rich*, 4 B. & S. p. 83 (but not now of authority, see *post*, p. 419): and of Cotton, L. J. in *Lyell v. Kennedy*, 23 Ch. D. p. 404, referred to *ante*, p. 408.

*Storey v. Lennox*, *ante*, affirming Lord Langdale, 1 Keen, 341, was a bill of discovery filed by the defendants to an action on a life policy against the plaintiff in aid of their defence. Lord Cottenham, at p. 536, observes (and see Lord Langdale, 1 Keen, p. 357, cited *post*, p. 472), "The defendant has set up no defence against the production, unless the proposition can be maintained, that a plaintiff is not entitled to inspect any document which is and contains information furnished to the defendant, as to evidence which can be produced or given on the defendant's behalf against a plaintiff, the producing of which to the plaintiff *might* disclose the names of witnesses (as to this see *Preston v. Carr*, *post*) intended to be examined, and evidence intended to be given on behalf of the defendant in the action." And he held that this did not constitute a ground for protection. But this proposition is of far wider scope than any that is contended for *ante*, p. 406: and see *post*, p. 412.

In *Llewellyn v. Baddeley*, 1 Ha. p. 533, Wigram, V. C. refers to Lord Cottenham's judgment in this case and states it as his impression that Lord Cottenham considered the privilege of a document in a case such as the one before him to depend in principle on the purpose for which and the circumstances under which it was obtained, and not exclusively on the character of the person who might actually obtain it. This was a suit for specific performance of a contract to sell an estate, and the document in question was a valuation made by a surveyor at the defendants' order in order to ascertain its real value and for the purpose of resisting this suit (the defence being inadequate consideration), and forming part of their evidence, and (as to this point, see *ante*, p. 410) not supporting the plaintiff's case. After saying that such documents might be privileged without calling in aid the doctrine of professional confidence (see *ante*, p. 410), that the point which he decided was expressly saved by Lord Cottenham in *Storey v. Lennox*, and that his decision was authorized by *Curling v. Perring*, and *Preston v. Carr*, *post*, he said, "I could not order the production of this document without deciding that a plaintiff may require a discovery from the defendant of the particulars of the evidence to be given by each of his witnesses except so far as he could show (as to this, see *ante*, p. 361) that his knowledge on the subject was



exclusively derived from his solicitor,"—a decision which it would be difficult to reconcile with the principle, that each party has a right to know his opponent's case but not the evidence by which that case is to be supported: and accordingly he refused to order production of the document as being a minute of the witness's evidence. See also *Micklethwait v. Moore*, 3 Mer. 295, where a surveyor's report of an estate referred to in the bill was protected, but (see *ante*, p. 247) under different circumstances.

In *Preston v. Carr*, 1 Y. & J. 175, the plaintiff was held not entitled to see communications after suit between the defendant and other persons, his witnesses, with a view to his proofs, being statements of fact which they would prove: p. 179: and the defendant was protected also apparently from particularizing the documents on the ground that it would involve a disclosure of the names of his witnesses (see *Storey v. Lennox*, *ante*), and to some extent of the nature of his proofs.

In *Curling v. Perring*, 2 M. & K. 380, the documents in question were correspondence between the solicitor and a third person after dispute: but in extending protection to them Lord Cottenham, p. 381, said that otherwise it would be impossible for a defendant to write a letter for the purpose of obtaining information on the subject of the suit without the liability of having the materials of his defence disclosed to the adverse party.

In *Kerr v. Gillespie*, 7 Beav. 572, protection was refused to letters written by a party confidentially to his agent abroad and in reference to his defence. But they were not alleged to contain his evidence; and at that date the privilege was more restricted: see *ante*, p. 368: and see *post*, p. 416, as to communication with agents.

Reports of scientific men (considered to be witnesses, see *Fenner v. S. E. R. Co.* L. R. 7 Q. B. p. 771) obtained as to some by the locomotive superintendent, and as to others by the solicitor of the company on the cause of an accident in view of litigation were protected in *Woolley v. N. L. R. Co.* L. R. 4 C. P. 602. In the same case a guarantee, given seven years previously of the materials used in the engine of the train to which the accident happened, was ordered to be produced. Qu. whether it could have been privileged as a document constituting evidence.

In *Gandee v. Stansfield*, 4 D. G. & J. 1, reversing Lord Romilly, 28 L. J. Ch. 436: 5 Jur. N. S. 778 (also reported in 7 W. R. 297, but qu. whether accurately) office copies of the examinations of the plaintiff (the decision in the court below as to the examinations of other persons was apparently not appealed, see the reports in the Law Journal and Jurist) taken in bankruptcy before bill filed at the instance of the defendants who were the bankrupt's assignees and apparently for the purpose of this litigation (described as being of the nature of minutes of their evidence) were protected: see also *ante*, p. 398, referring to this case. In *Fenton v. Queen's Ferry, & Co.* 38 L. J. Ch. 263: 17 W. R. 585, office copies of examination in bankruptcy (and affidavits in support of the applications therefor) of the plaintiffs, of the directors of the defendant company, and of other persons were protected by Malins, V. C. not as such (see *ante*, p. 409), but as having been taken by the plaintiff for the purpose of enabling him to get legal advice as to the institution of this suit. See also *Bell v. Johnson*, 1 J. & H. 682: 9 W. R. 549: *Ex parte Kenrick*, 7 L. T. 287, further as to these examinations.

It would follow from the propositions laid down *ante*, p. 405, and the authorities just considered, see in particular *Storey v. Lennox*, that the mere fact that the production of a document will disclose the evidence that is intended to be given at the trial is not of itself a ground for protection. In *Llewellyn v. Baddeley*, 1 Hare, p. 532, Wigram, V. C. con-



sidered that *Whitbread v. Gurney*, referred to *post*, p. 424, *Storey v. Lennox*, *ante*, and *Greenlaw v. King*, *ante*, p. 387, decided that not every document which has come into existence since the dispute commenced having reference to the dispute is necessarily privileged only because it discloses the evidence to be given on the part of the defendants.

Where the evidence information or materials have been procured directly or indirectly by the solicitor they are clearly privileged.

Evidence obtained by the solicitor, or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened or with a view to the defence or prosecution of such litigation: Jessel, M. R. in *Wheeler v. Le Marchant*, 17 Ch. D. p. 682 (and see the same judge in *Anderson v. Bank of British Columbia* referred to *post*, p. 416, and *ante*, p. 410) approved by Baggallay, L. J. in *Kennedy v. Lyell*, 23 Ch. D. p. 400. If a solicitor in contemplation of litigation obtains a report from a person whom he employs to collect evidence that report undoubtedly is privileged: Cotton, L. J. *ibid.* p. 405. Solicitors are protected in all communications with persons whom they suppose capable of giving evidence in favour of their clients: *Lafone v. Falkland Islands Co.* 4 K. & J. p. 36, commenting on *Curling v. Perring*, *ante*: (and see Blackburn, J. in *Malden v. G. N. R. Co.* L. R. 9 Ex. p. 301, but not now of authority, see *post*, p. 419): with a mine agent: *Original Hartlepool Collieries Co. v. Moon*, 30 L. T. pp. 585—586: but as to communications with an agent see *post*, p. 416. See also generally as to matter obtained directly or indirectly by a solicitor *post* (4).

Where protection was claimed for documents, among which were letters from the solicitor to a person who had been examined as a witness at the trial of an action between the same parties and to which the suit related, as being papers relating to the matters in question in the suit prepared and written after its institution for the purpose of the defence in that suit and the action, protection was refused to the letters, Shadwell, V. C. p. 478, considering that he could not infer that they contained confidential communications merely because they were written by the solicitor to the witness or from what was stated about them: *Mayor of Dartmouth v. Holdsworth*, 10 Sim. 476.

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(4) *Under the Advice or Direction of, or at the instance and for the use of, or for the purpose of being communicated to the Solicitor* (see *ante*, p. 406).

Information obtained directly or indirectly by a solicitor for the purpose of litigation seems to be recognized as clearly within the privilege although not strictly referable to the collection of evidence: see *ante*, p. 407, as to the distinction).

Information obtained from a third person by a solicitor for the purpose of litigation is privileged: *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 649. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to

defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that therefore is privileged: Jessel, M. R. *ibid.* p. 650: and see *Kennedy v. Lyell*, 23 Ch. D. p. 403: and *ibid.* 9 App. Cas. p. 86: and *ante*, pp. 360, 395.

Documents communicated to the solicitors by third parties containing information required or asked for by the solicitors are protected, where they have come into existence after litigation commenced, or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation or of obtaining evidence to be used in such litigation or of obtaining information which might lead to the obtaining of such evidence: Jessel, M. R. in *Wheeler v. Le Marchant*, 17 Ch. D. p. 681: and see *Southwark, &c. Co. v. Quick*, 3 Q. B. D. pp. 319, 322, referring to *Friend v. L. C. and D. R. Co.* 2 Ex. D. 437, cited *post*, p. 421.

Communications between the solicitor and a third person in the course of advising his client are only protected when in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it: all communications which he makes and are made to him for the purpose of giving him the information are in fact the brief in the action: see Cotton, L. J. *Wheeler v. Le Marchant*, 17 Ch. D. p. 684. And in this case production was ordered, see p. 685, of all the documents except such as were prepared confidentially (see *ante*, p. 378) after dispute arisen between the plaintiff and defendant for the purpose of obtaining information evidence or legal advice with reference to litigation existing or contemplated between the parties to the action.

Information obtained through an agent under the advice and direction of the solicitor relative to litigation and with a view to it is as much protected on principle as if it was procured through a solicitor: *Ross v. Gibbs*, L. R. 8 Eq. p. 524, as explained by Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 653: and whether as a matter of fact obtained for the purpose of knowing whether to defend or prosecute the action or as materials for evidence: see *ibid.* p. 650.

The communications of the person at a distance communicating the information desired by the solicitor are protected whether addressed directly to the solicitor, or to the party for the purpose of being communicated to the solicitor: *Lafone v. Falkland Islands Co.* 4 K. & J. 34: and see *Anderson v. Bank*, &c. p. 650. In *Lafone v. Falkland Islands Co.* a report containing information, sent by the company's agent abroad to the managing director in England in answer to enquiries which the solicitor had requested the latter to make for the purpose of procuring evidence, was protected, and was assumed to have been procured for the purpose of being communicated to the solicitor though there was no express assertion to that effect: (see further *post*, referring to *Southwark, &c. Co. v. Quick* as to this purpose).

Information sent at the instance of the solicitor by an agent employed by him or by the client on the recommendation of the solicitor, or in some way or other procured by a solicitor acting in the case for his client, is protected: *Bustros v. White*, 1 Q. B. D. p. 427.

In *M'Corquodale v. Bell*, 1 C. P. D. 471, the plaintiffs, suspecting that the defendants had tampered with certain tenders delivered by the plaintiffs for the supply of goods to a railway company, requested their solicitors to make enquiries of the company's solicitor with a view to ascertain the truth of their suspicions and to enable them to commence proceedings if desirable. The correspondence between their solicitors and the company's solicitors was held privileged, not because it was written privately and confidentially, nor merely as having reference to the subject-matter of the litigation, but because the questions were asked and the answers given with a view to anticipated litigation: see *ante*, p. 405, discussing some of the dicta in this case.

It is not however necessary that the documents should

have been prepared or the oral communications made at the instance or at the request of the solicitor: see *Southwark, &c. Water Co. v. Quick*, 3 Q. B. D. 315.

The true principle is that, if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, then it is privileged because it is something done for the purpose of serving as a communication between the client and his solicitor, and it makes no difference whether in fact it has or has not been laid before the solicitor so long as it was bonâ fide prepared with that object, and is so stated in the affidavit: see *ibid.* pp. 318, 320, 323: (see *Theodore Korner, ante*, p. 405, professing to follow this case: and see also this case further cited *post*, p. 418). The documents in question in this action passed in contemplation of litigation: qu. within what limits this principle is applicable where the communications have no reference to litigation, see *ante*, p. 391. See *Westinghouse v. Midland, &c. Co. ante*, p. 408, as to the necessity of clearly alleging that the documents were prepared for this single purpose: and also *post*, p. 423, in reference to communications between co-defendants: and *post*, p. 419, as to the non-necessity of expressly alleging that they were prepared "solely" or "merely" for this purpose.

Reports from the party's agents (but see further *post*, p. 416, as to agents) after dispute sent for the purpose of forming rough notes from which a statement was to be made and laid before the solicitor previous to his being actually consulted were protected in a common law action of *Chartered Bank of India v. Rich*, 4 B. & S. 73, p. 83 (not now of authority, see *post*, p. 419).

See also Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. pp. 648, 649, *ante*, p. 399.

Where the third person (or even the client) is doing the work of the solicitor his communications are protected. It must be noted that the sense in which the client or third party is here said to be doing the solicitor's work is very different to that more limited sense in which it has been seen that privilege will attach whether the work is done in reference to litigation or not, see *ante*, p. 401.

In *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 652, Jessel, M. R.

refers with approval to a passage in the judgment of Wood, V. C. in *Lafone v. Falkland Islands Co.* 4 K. & J. 36. There he says after referring to *Steele v. Stewart*, 1 Ph. 471, "It seems to me that the principle there laid down by Lord Lyndhurst is that the true test is not whether the person who is at a distance and communicates the information in question is the agent of the solicitor and sent out by the solicitor or the agent of the defendant and sent out by him: as Lord Lyndhurst there says, he may have been sent out by the defendant, and yet in collecting the information he may have acted under the direction and as agent of the solicitor: but the true test is whether such person in transmitting that information was discharging a duty which properly devolved on the solicitor and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person": and see *Chartered Bank of India v. Rich*, 4 B. & S. p. 83.

The solicitor is not bound any more than the client to do the work himself: he is not bound to collect information or testimony: he may employ clerks or agents, and on the same principle as information directly acquired by the solicitor is privileged so is that by the clerk or agent. Or where neither he nor his clerk nor an ordinary agent can obtain it, as for instance in a foreign country, he may request the client to obtain it himself and the information so obtained by the client at the request or advice of the solicitor is in a sense obtained by him as the agent of the solicitor. In other words if a solicitor asks the client to send somebody to collect information it is the same thing as if the solicitor himself had written to a person in foreign parts asking for information: see Jessel, M. R. *ibid.* pp. 649—650, 652. Or according to *Steele v. Stewart*, 1 Ph. p. 475, the agent is regarded as the solicitor and therefore his communications to the client are those of the solicitor.

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(5) *As to Communications from and to the Party's Agents.*

The propositions *ante*, p. 405, must be applied with some caution (see further *post*, p. 421, as to the result of the cases) to communications to a party by his agents: for the knowledge of the agent in the matter of the agency is that of the principal: see *ante*, p. 138. In *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 657, James, L. J. states to the effect that the principle that a party has no right to see that which comes into existence merely as the materials for the brief has no application to a communication between a principal and his agent in the matter of the agency giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. This may perhaps be rather too broadly stated: see *post*, p. 421. In the same case sufficient regard (see Mellish, L. J. p. 659) would hardly seem to have been paid to the distinction pointed out by Cotton, L. J. in *Southwark Water Co. v. Quick*, 3 Q. B. D. p. 321, between discovery by production of documents and discovery by means of interrogatories. It does not neces-

sarily follow that if the information must be given when required in answer to interrogatories the document containing the information must be produced. This distinction was certainly lost sight of by Cockburn, C. J. in *English v. Tottie*, 1 Q. B. D. p. 144, *post*. See also *Pavitt v. North Metropolitan Tramways Co.* and *Gort v. Rowney*, *ante*, p. 364.

In *English v. Tottie*, 1 Q. B. D. 141, the defendant purchased wood in Sweden, and, before it was shipped, re-sold it to the plaintiff. The plaintiff having complained of a portion, the defendant wrote to his agents to obtain information from the vendors on the subject of these complaints, and eventually received a large compensation from them. This correspondence the defendant refused to produce on the ground that they were confidential communications after claim made. Production was ordered by Cockburn, C. J. on the ground that the plaintiff ought to be put in possession of all the facts of the case, and this information being in the breast of the defendant ought to be disclosed (as to which see *ante*), and by Blackburn, J. on the ground that the correspondence was in no sense the work of an attorney. So far as the facts were disclosed the case was hardly distinguishable from *Anderson v. Bank of British Columbia*. No attempt seems to have been made in the affidavit to claim protection for them as information obtained for the purpose of evidence.

In *Anderson v. Bank*, &c. 2 Ch. D. 644, the manager observing that litigation was imminent and feeling that it was essential that the bank should have the benefit of legal advice and that for that purpose there should be obtained full particulars of all the facts and circumstances likely to be required by the solicitor telegraphed to the branch manager abroad, "Claims referred to letter 18 Sept. made for 25,000 dollars. Send by letter fullest particulars whole transactions especially cargo Melancthon and copy account": the letter from the branch manager in answer was held not privileged, there being, as was said by Jessel, M. R. p. 648, not a syllable to show that he was told expressly or impliedly that his communication was to be a confidential one for submission to the solicitor for his advice, in which case it would have been protected; see further *post*, as to this last point.

In *Bustros v. White*, 1 Q. B. D. 423, the question was whether some cargo had been damaged by bad stowage or by its being shipped in a bad state. The plaintiffs, the consignees, in their affidavit of documents claimed privilege on the ground that certain of the documents scheduled "consist of correspondence between the plaintiffs' firm in Liverpool and their firm abroad and relate to the condition of the cargo and to the plaintiffs' claim against the defendants and to the proceedings in the action and relate only to the plaintiffs' case and not to the defendants' case" (see as to this last form of claim *post*, pp. 482, 485). It was held that this disclosed no ground for claiming privilege though the letters might contain a mere voluntary expression of opinion without any more personal knowledge of the facts than was possessed by the defendants (see also *Martin v. Butchard*, *ante*, p. 405).

Qu. as to *Corp. of Bristol v. Cox*, 26 Ch. D. p. 685, where Pearson, J. seems to have held that a private and confidential report from the salvage sub-committee of the corporation to the corporation during and relating to the subject-matter of the litigation was privileged: and see also a passage in his judgment in this case cited *ante*, p. 389.

A report made by an agent of the client (here a company) by the direction of the client for the purpose of being submitted to the solicitor with the object of obtaining his advice

(in reference to litigation: and qu. whether not without reference to litigation, see *ante*, pp. 391, 399) is privileged: *Southwark, &c. Co. v. Quick*, 3 Q. B. D. 315, (transcripts of shorthand writers' notes of conversations and interviews between different officers and employes of the company, and a statement of facts drawn up by the chairman, obtained and made for the ultimate purpose, as to some through the medium of the board of directors, of being submitted to the solicitor for his advice in relation to the intended action). Brett, L. J. at p. 320 says, "I think it is enough if they come into existence as materials for the brief," and regards this phrase as one which may be enlarged into "merely for the purpose of being laid before the solicitor for his advice or for his consideration:" see further as to the judgments in this case *ante*, pp. 391, 415. See also *London, &c. Co. v. Kirk*, *post*. Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 648, lays down expressly that the principal must have informed the agent that his reports were desired for the purpose of being submitted to the solicitor; and that it is not enough for the principal to say in his affidavit that he did intend to submit them to the solicitor: see also *Lafone v. Falkland Islands Co.* *ante*, p. 416. It may be that this is so in the case of an agent, the report of or communication from a stranger being assumed to be for such purpose or for the purpose of collecting evidence: see *Woolley v. N. L. R. Co.* *post*, p. 420. It may however be noted that no such express limitation is to be found in *Southwark, &c. Co. v. Quick*.

It is not necessary to say expressly in the affidavit (but see *Westinghouse v. Midland, &c. Co.* *ante*, p. 408) that the documents came into existence "solely" or "merely" for the purpose of communication to the solicitor: *London and Tilbury R. Co. v. Kirk*, 28 S. J. 688. The action was one for damages occasioned by the burning of a shed owing to the negligence of the defendants who were employed as contractors: protection was allowed to reports received by them from their foreman with reference to the burning of the shed, obtained after litigation threatened for the purpose of being laid before their solicitor for his advice.



It would seem that a special communication by an agent without any request by his principal would be within the privilege if made for the purpose of communication to the solicitor for his advice: see Jessel, M. R. in *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 648: and see *Southwark, &c. Co. v. Quick*, *ante*.

It cannot however be said to be sufficient (as indeed it is not technically sufficient even in the case of communications from strangers: see *ante*, p. 404; and the propositions, *ante*, p. 405) to state that the reports were made at the special request of the principal with a view to the conduct of litigation commenced or anticipated, as laid down or suggested in some of the common law cases, *post*.

This question of the protection to be given to reports made by agents to their principals was much discussed in some common law cases. It is hardly necessary to investigate these decisions very closely. The very wide discretion which the common law judges were in the habit of exercising under the powers conferred upon them by the Common Law Procedure Acts deprives these cases of any absolute authority, see *ante*, p. 153. It is not very easy to reconcile these decisions and still less the dicta of the judges in these cases, although it was considered in *M'Corquodale v. Bell*, 1 C. P. D. 471, that the decisions were capable of reconciliation, and that all of them were in accord with the doctrine that documents brought into being with a view to the conduct of litigation, either already commenced or anticipated, a doctrine however which is submitted, see *ante*, and *ante*, p. 404, to be altogether unwarranted by equity practice, are privileged. In *Chartered Bank of India v. Rich*, 4 B. & S. p. 81 (Cockburn, C. J.): *Woolley v. N. L. R. Co.* L. R. 4 C. P. pp. 610, 613, 614: *Cossey v. L. B. & S. C. R. Co.* L. R. 5 C. P. pp. 149, 151, 153, 154: *Skinner v. G. N. R. Co.* L. R. 9 Ex. p. 99: such a proposition is laid down in absolute terms. In *Woolley v. N. L. R. Co.* p. 613, Brett, L. J. says, "any report or communication by an agent or servant to his master or principal which is made for the purpose of assisting him to establish his claim or defence in an existing litigation is privileged:" and so, p. 614, he



states that the question is whether the report is in his ordinary course of duty or for the instruction of his master or principal as to whether he should or should not resist litigation. In the cases in the Queen's Bench, *Fenner v. S. E. R. Co.* L. R. 7 Q. B. 767: *Malden v. G. N. R. Co.* L. R. 9 Ex. 300: (and see Blackburn, J. in *English v. Tottie*, 1 Q. B. D. p. 144, and *Skinner v. G. N. R. Co.* L. R. 9 Ex. p. 299, referring to these cases, and following in preference the rule laid down in the Common Pleas) no such absolute rule was laid down, but the matter was considered to be one rather for the exercise of the judge's discretion within certain limits: see *post*, referring to Blackburn, J. in *Fenner v. S. E. R. Co.*

In most of these cases the documents in question were reports of medical officers on persons injured in accidents, as to which see *post*, p. 421.

In *Woolley v. N. L. R. Co.* protection was refused to reports by servants of the railway company with reference to an accident, but allowed to reports of scientific men as to the cause of the accident, the latter being deemed to be made for the purpose of the action.

In *Chartered Bank of India v. Rich*, instructions given by the head office in London to the branch office to obtain evidence, and the reports in reply specifying the evidence which could be given, but before the attorney was consulted, were protected, as being, see Blackburn, J. p. 83, the rough notes from which a statement was to be made and laid before the attorney: but by Cockburn, C. J. p. 81 on a wider ground, see *ante*, p. 419.

In *Richards v. Gellatly*, L. R. 7 C. P. 127 (an action by a passenger in a ship against the agents for false representations as to its character and accommodation) protection was extended to communications passing after dispute arisen to the agents from the master or captain, not being such as would be written in the ordinary course. This decision, it is clear, would not be followed at the present day. Communications between other passengers and the agents were regarded as irrelevant (as to which see *ante*, p. 185).

A case of *Colman v. Trueman*, 3 H. & N. 871, an action for breach of contract in not accepting goods to which the defendant pleaded fraud, where correspondence between the plaintiffs and the consignors and the plaintiffs and their brokers in consequence of the defendant's repudiation and therefore apparently in view of litigation was ordered to be produced, was regarded as an exceptional case: see *Cossey v. L. B. & S. C. R. Co.* p. 150: *Chartered Bank of India v. Rich*, 4 B. & S. p. 81.

See also *Woolley v. Pole*, *post*, p. 514 (reports and lists of salvage).

In *Fenner v. S. E. R. Co.* L. R. 7 Q. B. pp. 771—772 it was laid down by Blackburn, J. that in cases of this kind the discretion of the court should be exercised as a rule to protect documents which are substantially rough notes for the case to be laid before the legal adviser or to be inserted in the brief, and that when the documents fall short of that production should as a rule be granted: and, p. 769, that answers to questions put by parties after litigation was impending were not necessarily privileged. And, p. 770, he gives the following illustration. When a manager writes to a station master, "We have a complaint as to the delay in delivering cattle at your station: report to us the circumstances," no privilege should attach to the answer. But where he writes, "It seems probable that if we resist this claim much will depend on the evidence of some particular person as to some particular

fact: please to learn from him what his evidence will be and communicate to us the result," the answer should as a rule be protected.

The measure of privilege to be afforded to reports of medical officers sent on behalf of a railway or tramway company to examine persons injured in an accident for which the company was liable was the subject of some discussion in the common law courts (see *ante* generally as to the common law cases), and also since the Jud. Act.

It seems to have been considered that when they were made after, and in consequence of, a claim for compensation in order to inform the company as to the person's condition: see *Cossey v. L. B. & S. C. R. Co.* L. R. 5 C. P. 146: *Skinner v. G. N. R. Co.* L. R. 9 Ex. 298: *Malden v. G. N. R. Co.* *ibid.* 300: they should be protected from production.

Since the Judicature Act they have been held privileged when made to the solicitor after claim made but before action, the plaintiff voluntarily submitting to be examined at the solicitor's request in view of the litigation apprehended in respect of such claim and of the evidence to be adduced in defence: *Pacey v. London Tramways Co.* 2 Ex. D. 440.

And also, as undistinguishable from this case, where made under a judge's order, which, not being made adversely, under 31 & 32 Vict. c. 119, s. 26, must be taken to have been made with the plaintiff's consent, though the words "and by consent" were struck out of the order: *Friend v. L. C. & D. R. Co.* 2 Ex. D. 437. Here they were made at the instance and for the use of the solicitor though not apparently directly to the solicitor.

Production however would not it seems have been ordered, though the examination was had before any formal claim was made, if had under an express or implied (as by the plaintiff's attorney being concerned in the arrangement) undertaking with the injured person that it was confidentially made for the company's guidance: see *Malden v. G. N. R. Co.*, where it was held that there was no such undertaking.

Where the executors of the injured person brought an action in effect to set aside a compromise entered into between the company and himself, reports of medical officers and also of one of the company's clerks sent to visit him for the purpose of negotiating the compromise, containing the result of the examination and interview were held not privileged, for, where a party sent his agents to see and negotiate with the other party, whatever passed at such interviews ought to be made known, and the other party or those representing him had a right to inspect the communications respecting them: (see as to this point *post*, p. 435): *Baker v. L. & S. W. R. Co.* L. R. 3 Q. B. 91, referred to in *Cossey v. L. B. & S. C. R. Co.* L. R. 5 C. P. pp. 153, 154.

On the whole there does not seem to be any distinction of principle between communications from an agent and from any other person. As regards the report of an agent made in the ordinary course of his duty it is clear that it cannot be said to be a document which comes into existence as materials for evidence or as rough notes for the brief or for communication to or under the direction of the solicitor within the terms of the proposition stated *ante*, p. 405. As regards a

report made at the special request of the principal, it will be protected if it can be brought within the terms of the proposition (subject always to the proviso that so far as it contains general information of the matters of the agency such information may have to be disclosed in answer to interrogatories), and the only practical distinction lies in the greater scrutiny that the court will exercise to see that it is really a communication of that character.

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(6) *Communications between Co-defendants or Co-plaintiffs.*

Communications between co-defendants (and co-plaintiffs) should it is conceived on principle be subject to the same general rules as those governing communications between a defendant and a third person. Recent cases seem to support this view, though some earlier authorities tend the other way. No doubt as a general rule correspondence between co-defendants is liable to production, as said in *Hamilton v. Nott*, L. R. 16 Eq. p. 115, referring to *Betts v. Menzies* and *Goodall v. Little*, *post* (see also *Flight v. Robinson*, 8 Beav. 22, where communications between the defendants, assignees of an insolvent, and the insolvent and his solicitor, and memoranda of proceedings at a meeting of creditors were ordered to be produced: but see *ante*, p. 368, as to the state of the law at that period: and *A. G. v. Johnston*, W. N. 72, p. 12, communications between executors and a college the object of a secret trust): but see *Corp. Bristol v. Cox*, *ante*, pp. 389, 417, as to communications between agents of a corporation relating to the conduct of litigation: the question however is whether privilege is denied to such documents when they come within the propositions laid down *ante*, p. 405.\* In this case of *Hamilton v. Nott*, one defendant, himself a solicitor, was acting as agent of the co-defendant's solicitor in the action to

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\* *Allen v. Royden*, 43 L. J. C. P. 206, where private and confidential letters between co-plaintiffs when litigation was in view were protected, cannot be supported.

collect evidence, and communications for that purpose between himself and his co-defendant were protected. And, purporting to follow his decision in this case, Malins, V. C. in *Carr v. New Quesbrada, &c. Co.* W. N. 73, p. 208, refused to order production from the defendant company of notes made by a co-defendant, when manager of the company, from which a statement was to be compiled for the use of an arbitrator in an arbitration on the same subject-matter but never held. In each of these cases the party may be said to have been doing the solicitor's work, see *ante*, p. 415. So on principle (see *ante*, pp. 415, 418) a letter written by one defendant to his co-defendant for the bonâ fide (see *ante*, p. 418) purpose of being communicated to the solicitor of either of them should fall within the privilege, though mere instructions to communicate such a letter cannot make it privileged, unless it was written for the purpose of such communication, see *post*, discussing *Betts v. Mensies*; there must be a statement on oath that the letters were sent for that purpose: see *Reid v. Langlois*, 1 M. & G. p. 639, referred to *post*, p. 424. In *Jenkyns v. Bushby*, L. R. 2 Eq. 547, a letter written by a defendant to his co-defendant with instructions to send it to their joint solicitor was protected: but see the cases *post*.

There are however decisions and dicta which it is difficult to reconcile with the above views, though the balance of authority is, it is conceived, in favour of their soundness.

In *Betts v. Mensies*, 3 Jur. N. S. 885, protection was refused to letters received by a defendant from his co-defendant abroad, and relating to his defence, on the ground that it was not necessary for the interests of society that two co-defendants should be at liberty securely to concert together measures of defence, and that there was no authority, and that it would be very dangerous to hold, that when co-defendants chose to communicate, each of them being at liberty to communicate with a common solicitor or with separate solicitors as they might see fit, their communications were not to be disclosed. But it was also suggested that a statement that copies were sent to the solicitor might afford protection. It is submitted that such a suggestion involves a misconception of principle. The question is for what purpose were the documents sent, not what was in fact done with them. No document acquires privilege by the use that is made of it except under the special circumstances considered *ante*, p. 391: see *ante*, pp. 390, 391.

In *Goodall v. Little*, 1 Sim. N. S. 155, protection was refused to letters written by a co-defendant abroad to his co-defendant in England, though stated to have been written for the purpose of being communicated to the latter's solicitor with a view to his defence, *Steele v. Stewart*, 1 Ph. 471 (where letters were sent from India to the defendant to be laid before his solicitor), p. 164, being distinguished on the ground that there the writer

was the solicitor's agent sent out to procure evidence, and therefore the letters were in the same position as letters from the solicitor himself. And, p. 164, Lord Cranworth observed (with the approval of Lord Truro in *Glyn v. Caulfield*, 3 M. & G. p. 474), that no protection existed as to letters passing between the parties themselves or from a stranger (but such letters from a stranger would it is conceived be privileged, see *ante*, pp. 399, 415) to a party merely because such letters may have been written in order to enable the person to whom they were sent to communicate them in professional confidence to his solicitor.

In *Reid v. Langlois*, 1 M. & G. 627, letters written by a party abroad to his agent in England to be communicated by him to his legal advisers in England were held privileged. In *Hooper v. Gunn*, 2 J. & H. pp. 605—607, it was said that a party was not bound to communicate directly with his solicitor but might do so through the medium of an agent, and *Reid v. Langlois* and *Goodall v. Little* were attempted to be reconciled on the ground that where the communications are between co-defendants there is no reason for withholding the documents, for the subject-matter of the communication can be extorted from the recipient as facts within his own knowledge by means of interrogatories; for the defendant having received the information from his co-defendant could no more protect himself from disclosing it when once he knew it than if he had acquired the knowledge in any other manner (but qu. see *ante*, p. 359). As to this suggestion the following observations may be made. In the first place it by no means follows (see *ante*, pp. 139, 416) that assuming that this information could be extracted from a party by means of interrogatories that therefore the production of a document containing that information can be ordered. In the second place it was not the ground upon which the decision in *Goodall v. Little* was professedly based; it was the character of the writer of the letter and not the recipient that was held to exclude the privilege. And even if decisions of this nature are to rest upon the consideration of reasonable necessity, as suggested in *Hooper v. Gumm* (as to which see *ante*, p. 400, and *post*), it can hardly be said to be a reasonable necessity for a party abroad to have a confidential agent in England through whom he may communicate with the solicitor (*Hooper v. Gumm*, p. 607) and not a reasonable necessity to make his partner and co-defendant in England the medium of such communications.

In *Glyn v. Caulfield*, 3 M. & G. 463, on the strength of the above dictum of Lord Cranworth in *Goodall v. Little* and the authority of *Whitbread v. Gurney*, 1 Y. 541 (where the letters were merely stated to have passed between the co-defendants with reference to their defence and were therefore clearly unprivileged, and where Lord Lyndhurst said that the rule laid down in *Bolton v. Liverpool* as to letters between parties and solicitors did not apply to letters between the parties themselves), Lord Truro refused (see p. 474) protection to confidential correspondence in reference to the pending litigation between the defendants (shareholders in a company) and their co-shareholders (whom in this suit they virtually represented) directors or agents, though some of them were stated to have passed for the purpose of being submitted to or obtaining information to be submitted to the legal advisers for their advice with the exception of such parts as contained the opinions of the legal advisers (as to which see *ante*, p. 369).

The observation of Lord Truro in *Glyn v. Caulfield*, p. 474, is no doubt just to the effect that the rule of professional privilege being adopted simply from necessity ought not to be extended further than is absolutely necessary to enable the client to obtain professional assistance with safety (and see *ante*, p. 351). At the same time it must be remembered (see *ante*, p. 399) that *Reid v. Langlois* has conclusively decided that a suggestion that the particular instrument or method of communication need not have been adopted is no ground for refusing protection to it if in fact the communication falls within the principle: and see *ante*.

Nor should it make any difference in this respect whether the same solicitor is acting for both defendants, or whether each has a separate solicitor, so long as the communications have been made in furtherance of the same interest and not in respect of adverse interests.

## PART III.

## THE PROFESSIONAL LEGAL ADVISER.

I. *Waiver, Loss, and other Instances of non-existence of Privilege.*

It is the privilege of the client and not of the legal adviser: *Beer v. Ward*, 1 Jac. p. 82: *Herring v. Clobery*, 1 Ph. p. 96.

The latter is bound to claim it in the interest of the client and may not waive it: *Greenlaw v. King*, 1 Beav. p. 144. As a witness the court would not even allow (but see *Hilberd v. Knight*, 2 Exch. p. 12, referring to *Marston v. Doucnes*, 6 C. & P. 381) him to disclose his client's secrets: *Cholmondeley v. Clinton*, 19 Ves. p. 267: *Wilson v. Rastall*, 4 T. R. p. 759: *Phill. Evid.* p. 106: *Beer v. Ward*, 1 Jac. p. 80.

The privilege obtains though the client is not in any shape before the court: *R. v. Withers*, 2 Camp. 578. Lord Eldon considered that he must name his client: *Parkhurst v. Lowten*, 2 Sw. p. 201: see however as to discovery of his client's name *ante*, p. 376, and *post*, p. 439.

Where the client has waived the privilege the discovery must be given: *Merle v. More*, R. & M. 390: *Phill. Evid.* p. 106: and see *Blenkinsopp v. Do.* and other cases *post*.

Qu. whether or how waiver after putting in the answer can be taken advantage of by the adversary. In *Chant v. Brown*, 7 Ha. p. 87, Wigram, V. C. considered that as regards the answer the question was whether it was sufficient when put in, and therefore a subsequent waiver had no effect: but that on a motion for production it was otherwise, referring to *Blenkinsopp v. Blenkinsopp*, 17 L. J. Ch. 343: 2 Ph. 607. In this case (reversing 10 Beav. 143) both client and solicitor were defendants. The solicitor claimed privilege for certain documents: the plaintiff amended his bill and charged that the client repudiated his assumed character of solicitor in relation to those documents, but did not require the client to answer it. On moving for production against the solicitor the plaintiff desired to read the answer of the client (who was served) to the original bill to show the repudiation: the Lord Chancellor thinking that there was no such repudiation as to the particular documents suggested that he should be required to answer the charge in the amended bill. The client put in an answer and claimed privilege: it was held that on the two answers together he had not established the relation. See further as to this case *ante*, p. 209: and see also *Re Cameron v. Coalbrook, &c. R. Co.* 25 Beav. 1, cited *ante*, p. 209, where, on the solicitor objecting to produce his client's documents, Lord Romilly desired that application should be made to the client, for that if he did not object the solicitor must produce them: and *Gaskell v. Chambers*, 26 Beav. 303, also cited *ante*, p. 209, where, though the solicitor objected, the client who was present did not object.

The common law practice seems to have been to call upon the client as



witness to produce the document which his solicitor objected to produce in order to let in secondary evidence: see *Newton v. Chaplin*, 10 C. B. 356: *Doe d. Gilbert v. Ross*, 7 M. & W. p. 122: 2 Phill. Evid. 280.

In some cases the circumstances may be such that the client is not entitled to have the privilege asserted on his behalf by his legal adviser: see as to the absence of any privilege in respect of a fraudulent transaction to which both client and solicitor are parties *ante*, p. 352. It seems possible to refer to this view certain cases where the legal adviser has been ordered to answer as to the possession or whereabouts of certain documents: Mr. Hare in *Hare on Discovery*, p. 171, taking rather a narrower ground, refers to them as illustrative of the proposition that a solicitor may properly be made a party to a bill for discovery and production of deeds if he improperly withholds them (see as to this *ante*, pp. 44, 196), and that in such a case he must at least answer as to his possession of them and give a list of them. Mr. Hare indeed, p. 172, observes that it is a common practice for a solicitor to give a list, citing *Greenough v. Gaskell*, 1 M. & K. 98. But qu. as to the soundness of such a practice. Unless under special circumstances of one kind or another such discovery would seem to fall within the privilege; the disclosure in many cases might involve a serious breach of confidence: see *post*, p. 431: *Volant v. Soyer*, 13 C. B. p. 236, *post*, p. 440: and *Coleman v. Orton*, *post*, p. 438. As a witness it seems a solicitor must have answered whether or not he had a particular document belonging to his client in his possession or in court, though he had received it from his client in the course of communication with reference to the cause, in order to let in secondary evidence of its contents: see *Beran v. Waters*, M. & M. 235: *Coates v. Birch*, 2 Q. B. 252: *Dwyer v. Collins*, 7 Exch. p. 746: Phill. Evid. p. 129.

*Kington v. Gale*, 2 Finch, 259, was a bill for discovery of a deed in the defendant's custody, and of its contents: the defendant demurred on the ground that he was an attorney and was entrusted with it by his client. He was ordered to discover whether there was such a deed, where it was, to whom he had delivered it and where he last saw it, and in whose custody, but not to produce it or discover its date or contents.

In *Stanhope v. Knott*, 2 Sw. 221, n. a bill for discovery of deeds, defendant



pleaded that he knew nothing of them otherwise than as counsel and that he had them not. It was held not sufficient to plead that he knew nothing but as counsel without divesting himself of them and disclosing to whom he had delivered them, for otherwise deeds having been played into the hands of a counsel might be suppressed, and the party injured left without his remedy.

*Banner v. Jackson*, 1 D. G. & Sm. 472, was a suit against J. and his solicitor for delivery up of documents of title of certain property which the plaintiff had recovered in an ejectment action against J. The solicitor in his answer admitted that they were in his custody, but said that he had parted with them before trial of the action. Knight Bruce, V. C. held p. 476, reluctantly following *Stanhope v. Knott* and *Kington v. Gale*, that the solicitor must discover to whom on what occasion and for what purpose he parted with them. See *Berry v. Keen*, *ante*, p. 42, referring to this case.

See also *Rothwell v. King*, 2 Sw. 221, n. where it was said that the trust of a counsel did not extend to the suppression of deeds and wills the bill charging suppression on all the defendants: see also as to this case in connection with the subject of a fraud to which both client and solicitor are parties, *ante*, p. 355.

Where a legal adviser acts for more than one person in a transaction, or where, having acted for one person, the interest of this person has become divided amongst two or more persons, each of these persons (so far as his interest is affected, see *Chant v. Brown*, 7 Ha. pp. 88—89), and in some cases also the personal representative of the client, see *Chant v. Brown*, 9 Ha. pp. 794, 796, and see *ante*, p. 387, must waive the privilege before he can be called upon to make disclosures in favour of a stranger: see also *post*, p. 442.

In *Strode v. Seaton*, 2 A. & E. 171, it was held that a draft conveyance, made by the vendor's attorney, but considered to have been employed in this respect both by vendor and purchaser, and deposited with him and held by him on behalf of both, could not be produced without the assent of both, and therefore not against the interest of the purchaser's devisees though the vendor assented. See this case also referred to *ante*, p. 387.

But where the solicitor is acting only for the mortgagor in a mortgage the mortgagee or his representative cannot object to the disclosure of the communications between the mortgagor and the solicitor: *Chant v. Brown*, 9 Ha. 790, a suit brought to impeach the mortgage as being founded on a fraudulent appointment.

As between the different persons for whom he has acted, or on whom the interest of the client has devolved, there can of course be no privilege: each can insist upon a disclosure in his favour: see *ante*, p. 385: but see *Gibbon v. Strathmore*, 11 L. J. Ch. 366, *post*, p. 437.

In *Chant v. Brown*, 7 Ha. p. 88, Wigram, V. C. considered that the position of the solicitor in claiming privilege was not affected by his having subsequently become himself the owner of the property. It is submitted that on principle he should

in such a case be regarded for the purpose of testing the extent of the privilege as the owner and not as the solicitor: see however the opinion of Wigram, V. C. contra. In *Few v. Guppy*, 13 Beav. 459, a plaintiff who was both trustee and solicitor of the trust seems to have been regarded as the client in respect of communications between a predecessor in title and himself as his solicitor.

The attorney cannot break through the privilege for his own benefit in an action against his client: see *Cleave v. Jones*, 21 L. J. Ex. 105: 7 Exch. 421 (contents of an account-book made out and sent to him in answer to a request for information in order to prepare case for counsel).

A partner in a firm of solicitors cannot claim privilege so as to withhold discovery and production of material papers from the representatives of the other partner in a suit to take the partnership accounts: *Brown v. Perkins*, 2 Ha. 540: see further as to this case *ante*, p. 178. So discovery was ordered (among other things of the clients' names) from a London agency (to a share in the profits in which the plaintiff claimed to be entitled) but so that the clients' interests must not be prejudiced: *Reade v. Woodroffe*, 24 Beav. p. 425: see *ante*, p. 307.

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## II. *Generally as to the Position of the Professional Legal Adviser.*

Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. p. 102, thus (perhaps too broadly, see *post*, p. 435) defines the position of professional legal advisers. "If touching matters that come within the ordinary scope of professional employment they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business, or which amounts to the same thing if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to their client, they are not only justified in withholding such matters but bound to withhold them, and will not be compelled to disclose the

information or produce the papers in any court of law or equity either as party or witness." If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as counsel or attorney he may plead in bar of the discovery that his knowledge of the fact was so obtained: *Redes*. Pl. 288. See also *Lyell v. Kennedy*, 9 App. Cas. p. 86.

Where production of documents is required the legal adviser can only be ordered (by the machinery of discovery, for as witness it is different: see *Phill. Evid.* i. p. 125, ii. p. 280: *Tayl. Evid.* p. 411: the objection to production being there treated as a question of privilege) to produce documents which are his own property, for where they are the client's property the legal adviser is in the same position as anyone else called upon to produce documents in his own corporeal possession but belonging to another person. He cannot be compelled to produce another person's property: (see *ante*, p. 199, as to the position of a solicitor in respect of his client's documents treated as a question of property). Where the documents are his own property just as he cannot be compelled to discover the information professionally acquired in the form of answers to interrogatories, so is he protected from discovering it in the shape of documents giving this information.

The privilege therefore which the legal adviser is able to assert on behalf of his client covers considerably wider ground than that which the client can himself assert:\* see also *ante*, p. 358.

The position of the legal adviser in regard to disclosing what has been communicated to him in his professional capacity was said by Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. p. 115, to be the same whether giving evidence as witness or discovery as party.

The obligation which rests upon him to avoid all voluntary

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\* It is difficult to follow a dictum of Lord Romilly in *Lewis v. Pennington*, 29 L. J. Ch. p. 692, to the effect that when a solicitor is made a party in any other character than a solicitor he is bound to give all the information which his client would be bound to give: but see *post*, p. 430.

disclosures of his client's affairs, see for instance *Beer v. Ward*, 1 Jac. 77: *Cholmondeley v. Clinton*, 19 Ves. 261: *Little v. Kingswood, &c. Co.* 47 L. T. 323; must not be confounded with his privilege to refuse to give evidence or discovery. It does not necessarily follow that because he may not voluntarily disclose out of court certain facts brought to his knowledge in his legal capacity he may refuse to disclose them under the order and sanction of the court: see *Moore v. Tyrrell*, 4 B. & Ad. p. 878: *Taylor v. Blacklow*, 3 Bing. N. C. pp. 247—249: and see *ante*, p. 302, as to this distinction in relation to discovery generally.

In all cases in which the client would be protected from discovery on the ground of privilege the professional legal adviser would also be protected.

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### III. *His Knowledge must be solely derived from his Employment as Professional Legal Adviser.*

To come within the privilege the matters must have been committed to or learnt by him in his professional capacity and in no other way: that is to say they must be matters which but for his employment as a professional man he would not have become possessed of or learnt: see *Greenough v. Gaskell*, 1 M. & K. pp. 101, 104—105. If he has acquired knowledge of such matters from any other source or in any other way then though he may have also acquired it either previously or subsequently under circumstances such as by themselves to confer privilege the disclosure must be made, see *Leuris v. Pennington*, 29 L. J. Ch. 670, p. 672;\* and *Kennedy v. Lyell*, 23 Ch. D. p. 407.

That the matters are his client's secrets confers no privilege: the question is whether he obtained knowledge of them in his relation of solicitor to his client: *Morgan v. Shaw*, 4 Madd. pp. 57—58.

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\* Qu. whether the dictum of Lord Romilly in this case cited *ante*, p. 429, is referable to this point.

If he were a party and especially to a fraud, and the case may be put of his becoming informer after being engaged in a conspiracy :\* that is if he were acting for himself though he might also be employed for another he would not be protected from disclosing it, for in such a case his knowledge would not be acquired solely by his being employed professionally : *Greenough v. Gaskell*, p. 104.

So where he occupies a double position as solicitor and trustee : see *Few v. Guppy*, cited *ante*, p. 428 : see also *Marsh v. Keith*, 1 Dr. & Sm. 342, where however it seems that the trustee had acquired the information only as solicitor to his co-defendant.

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IV. *As to the Matters to which Privilege will be allowed as having come to the Knowledge of the Professional Legal Adviser acting as such.*

The subject has been discussed *ante*, p. 373 to p. 377, in connection with the position of the client : what is there said is equally applicable to the case of the professional legal adviser. The observations and cases *post* are in addition to those made and cited. Some are of application only to the case of the legal adviser : others cover the case of the client.

Theoretically the test is whether the disclosure would involve a breach of confidence, whether that is to say the information document or communication has been confidentially obtained or made : see *Spenceley v. Schulenberg*, 7 East, 357 : *Desborough v. Rawlins*, 3 M. & C. 515 : *Parkhurst v. Lowten*, 2 Sw. p. 216 : *Bowles v. Stewart*, 1 Sch. & Lef. p. 226 : *Dwyer v. Collins*, 7 Exch. pp. 645—646 : *Marriott v. Anchor, &c. Co.* 3 Giff. 304 : *Ex parte Campbell*, L. R. 5 Ch. p. 705 : *Greenough v. Gaskell*, 1 M. & K. p. 104 : *Kennedy v. Lyell*, 23 Ch. D. pp. 403—404, 406. The difficulty however is not as to the principle but in applying it to the varying circumstances of each case. It is hardly possible to do more than state shortly the very many cases on the subject. Neither now is it easy, nor was it in Lord Cottenham's time : see *Desborough v. Rawlins*, 3 M. & C. p. 519 : and *Kennedy v. Lyell*,

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\* See as to fraud, conspiracy, &c. *ante*, pp. 352—354.

p. 400: to lay down any rule as to the length to which privilege extends consistently with the cases. In *Kennedy v. Lyell*, pp. 405—406, Cotton, L. J. endeavours to classify some of the cases: one class being referable to the principle that no communication made to a solicitor by or on behalf of the opposite party can be confidential; the other class to the principle that the legal adviser cannot refuse to give evidence of facts patent to his senses. It may be convenient to follow out this line in dealing with the cases.

(a) *As to Communications from (or "to" see *Gore v. Bowser*, *Griffith v. Davies* and *Bramicell v. Lucas*, post) an opposite Party or generally from collateral Quarters.*

It has been laid down in various cases that there is no privilege as to communications from collateral quarters. The privilege of an attorney only extends to confidential communications from his client, and not to communications from collateral quarters although made to him in consequence of his character of attorney: Lord Ellenborough in *Spenceley v. Schulenberg*, 7 East, p. 358. And Lord Cottenham adopts this proposition as to communications from collateral quarters in *Sawyer v. Birchmore*, 3 M. & C. p. 577, and *Desborough v. Rawlins*, 3 M. & C. p. 522: see also *Mackenzie v. Yeo*, 2 Curt. pp. 868, 871—872: Taylor, Evid. p. 786. Now in the first place it is clear that this proposition is too broadly stated: for, as pointed out by Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. p. 405, and see *ante*, p. 413, a report obtained by the solicitor in contemplation of litigation from a person whom he employs to collect evidence is undoubtedly privileged: and see *ibid.* 9 App. Cas. p. 86.

In *Ford v. Tennant*, referred to *post*, Lord Romilly, pp. 167, 168, though he considered that privilege should not extend to a case where the information was obtained by a solicitor acting as such but was not derived from the client, recognized that the authorities while restricting it to communications between solicitor and client extended it to all other persons with whom the solicitor must communicate in order to conduct the cause, such as communications between client or solicitor and persons employed to get up evidence, as in *Steele v. Stewart*, referred to *ante*, p. 416, and that there was a broad distinction between information derived in these cases and information derived from third parties strangers or opposite parties.

In the second place in no one of these cases, except perhaps *Sawyer v. Birchmore* referred to *post*, nor in any of the other cases on this point, did the actual decision involve so broad a proposition even with regard to communications having no reference to litigation. In every one of the following (and see also *Tristram v. Roberts*, *post*, p. 439) cases it will be found that the person with whom the communications took place was an opposite party in the sense that there was a question in dispute between him and the client: and see Cotton, L. J. in *Kennedy v. Lyell*, 23 Ch. D. pp. 405—406.\* In *Lonsdale v. Heaton*, 1 Y. p. 77, Alexander, L. C. B. says: "On the one hand I cannot accede to the proposition that to enable the witness to protect himself from answering, the communication must have come from the lips of the client himself. On the other hand the proposition that an attorney shall be protected from discovering any information which in the course of his employment he receives in any way or at any time is wholly wild, and, if correct, it would come to this that an attorney can never be a witness in any case, which is contrary to every day's practice. I think the true rule lays between the two, and inclines rather more to the former than to the latter proposition." In this case he considered that the solicitor should state that the particular fact interrogated to was communicated to him by his client or how he derived knowledge of it.

So perhaps some of the cases (for instance *Gore v. Bowser*: and see *Original, &c. Co. v. Moon*, 30 L. T. 193: and also *post*, p. 440) may be supported on the ground that the solicitor was acting merely as the medium of communication between the client and the third person, and either not in any strictly legal capacity, or not in any confidential (see *ante*, p. 378) capacity.

It will be noted that in *Desboro' v. Rawlins*, *post*, the communications were not made to the solicitor but to the client in the presence of the solicitor.

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\* It may be noted generally that in *Kennedy v. Lyell*, p. 405, the same judge refuses to accept the expressions of the judges in some of these cases as absolute and exhaustive statements of the law applicable to them.



See also as to communications between solicitors and third parties *ante*, pp. 403, 413, 414.

In *Spenceley v. Schulenberg*, 7 East, 357, an attorney as witness was held bound to prove the contents of a certain document (a notice to produce) served on him as the defendant's attorney by the opposite party, the plaintiff, for the privilege did not extend to adverse proceedings communicated to him as attorney in the cause for the opposite party, in the disclosure of which there could be no breach of confidence.

In a case of *Gore v. Bowser*, 5 D. G. & Sm. 30, a suit to set aside a deed on the ground of the fraudulent insertion of a particular clause, the defence being that the plaintiff had notice of it, the plaintiff's solicitor was compelled as witness to disclose in favour of the defendant what passed at an interview between himself and the defendant in order to prove such notice: Parker, V. C. observing, p. 34, that it was an every-day practice to produce letters between a party's solicitor and the opposite party or his solicitor. But in Sugd. V. & P. p. 784 it is laid down that the counsel attorney or agent (qu. as to agent) of the purchaser cannot be admitted to prove notice.

So in *Griffith v. Davies*, 5 B. & A. 502, it was said that the attorney could not refuse to state what he had communicated to the opposite party by order of his client, for it was not a confidential disclosure but an open communication from one adversary to another, something which had been already said to the plaintiff, to this extent disapproving a contrary decision in *Gainsford v. Grammar*, 2 Campb. 9 (where he was protected from stating the nature of the propositions he made to the plaintiff by the defendant's order), though not what his client actually said to him: and accordingly in this case he was held bound to state what passed at a conversation between the plaintiff and defendant respecting a compromise at which he was present as the defendant's solicitor.

See also *Weeks v. Argent*, 16 M. & W. 821, where it was said that where the attorney of one side was present at a bargain with the other side he might give evidence of what passed, and therefore in this case might state what was the consideration for a certain note given on such an occasion: and *Shore v. Bedford*, 5 M. & G. 271, where the plaintiff's attorney was held bound, as against the objection of the defendant, to state what passed on an occasion when the plaintiff and defendant went together to him, and to give in evidence a letter which the defendant had then instructed him to write to a third person.

In *Bramwell v. Lucas*, 2 B. & C. 745, discussed *post*, p. 441, it may be noted that at p. 749 it is said that no privilege attaches to a communication made by the attorney to others where it might have been made by any other (see also a passage in *Greenough v. Gaskell* referred to *post*, p. 436) person as well as an attorney and where the character or office of attorney has not been called into action: see also *Sandford v. Remington* and *Caldbeck v. Boon*, *post*, p. 439.

*Desborough v. Rawlins*, 3 M. & C. 515, was a suit by one insurance company against the directors actuary and solicitor of another insurance company to have a life policy declared void. The question was whether the solicitor was bound to discover what passed on an occasion when, in answer to a proposition by the defendant company to a third insurance company to insure the same life, the actuary of this last company came to the office of the defendant company bringing an unfavourable report on the life by their medical officer and refusing the insurance. He refused to discover whether the actuary brought the report and handed it over, or whether he made such statements as alleged, or what statements. Lord Cottenham observed, p. 520, that it was a transaction between two companies to some extent in opposition to one another: that, the communication being one from an adverse party, it would not be easy to consider it privileged if made directly to the solicitor for the purpose of communication, as was the case in *Spenceley v. Schulenberg*; again on p. 522, he referred to his decision in *Saucy v. Birchmore* as cited *post*, and on p. 524 observed that it would be very difficult for

the attorney to protect himself from stating whether the actuary came with a particular document in his hand, for that if it had been communicated to the solicitor it would be exactly within *Spenceley v. Schulenberg*, and generally refused to protect him until, p. 525, he knew exactly how he came to be there and who sent for him, not considering it sufficient for him to say merely that he was there as the solicitor and acquired his knowledge solely as such solicitor.

In *Sawyer v. Birchmore*, 3 M. & K. 572, an attorney was examined as a witness by the plaintiffs and was asked whether he had been employed as solicitor for any and which of the parties, what letters passed between him as such solicitor and any and which of the other parties or any other persons, and to produce them or set forth their contents, and whether he attended any meetings of any of the parties and what took place thereat. He answered that he was employed as solicitor for A B and C, three of the defendants, that he wrote and received letters as such solicitor, but as to the persons to and by whom the letters were sent (see also *Marriott v. Anchor, &c. Co. post*, p. 439) and the other matters he claimed privilege. Lord Cottenham held, p. 577 (and see *Desborough v. Rawlins, ante*) that *Spenceley v. Schulenberg* and *Bramwell v. Lucas* showed that letters communicated to the attorney from collateral quarters, to which the interrogatory clearly pointed, were not protected, and that the witness was bound to answer questions seeking information as to matters of fact as distinguished from confidential communications: (as to this last point see *post*, p. 436). Cotton, L. J. in *Kennedy v. Lyell*, p. 406, places this case amongst the second class of cases that is to say, see *ante*, p. 432, as referable to the principle that the solicitor was only asked to give evidence of a fact patent to his senses. But this explanation of the decision seems insufficient. Lord Cottenham expressly held the letters to be outside the privilege as being communications from collateral quarters. And in this respect it goes beyond the other decisions, for here the persons with whom the communications passed were in no sense opposite parties or parties with whom there was a dispute. It may be observed that the decision is capable of support upon a ground referred to in the argument but not in the judgment, namely that at that time both plaintiffs and defendants were acting together in the same interest as next of kin, and that these communications might be held to have passed partly on the plaintiffs' behalf: see as to this point, *ante*, pp. 379, 382.

In *Ford v. Tennant*, 32 Beav. 162, Lord Romilly, recognizing the inconsistency between the rule conceived to be established by these cases that collateral communications are not privileged (except as stated *ante*, p. 432) and the passage, quoted above p. 428, from Lord Brougham's judgment in *Greenough v. Gaskell*, 1 M. & K. p. 102, where communications made on account of and for the benefit of the client are included within the privilege (and see *ibid.* pp. 104—105 "communications on his client's behalf"), preferred to follow the former, and accordingly ordered a solicitor to produce letters and disclose communications between the defendant and himself, as the solicitor of a person not a party to the action, and between whom there seems to have been a question in dispute: see also Cotton, L. J. in *Kennedy v. Lyell*, p. 406, referring to this case.

Reference may also be made to *Marsh v. Keith*, 1 Dr. & Sm. 342, p. 348, where it was not considered sufficient to say that the solicitor had acquired his knowledge by virtue of his employment as solicitor in relation to the matters in question and from no other source; for it was consistent with that statement that the communication might have been made to the solicitor without any communication from or consultation with the client: but see *Kennedy v. Lyell*, 23 Ch. D. p. 407, where Cotton, L. J. considered *Marsh v. Keith*, as only laying down that the mere fact that the information was acquired by the solicitor from third parties during his employment as solicitor did not necessarily protect it: and see *post*, p. 441.

*Baker v. L. & S. W. R. Co.* L. R. 3 Q. B. 91 (cited *ante*, p. 421) is also referred to by Cotton, L. J. in *Kennedy v. Lyell*, p. 405, as an instance of the exclusion from privilege of communications with opposite parties.

Qu. whether the solicitor could claim privilege where his knowledge of a communication from the opposite party to his client has been derived not by being present at an interview but by being informed of it by the client. In *Spenceley v. Schulenberg* (*ante*, p. 434), Lord Ellenborough questioned whether if the attorney had acquired his knowledge of the contents of the paper from his client instead of having received the paper himself it would have made any difference.

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(b) *As to the Principle that the Legal Adviser cannot refuse to give Evidence of Facts patent to the Senses, or of Collateral Matters Information or Facts.*

See as to the obligation to give discovery of facts patent to the senses, *ante*, pp. 360—362, discussing *Kennedy v. Lyell*: and in particular *Brown v. Foster*, *post*, p. 438.

See in particular as to the obligation to give discovery of collateral matters information or facts: *Ex parte Campbell*: and *Doe d. Jupp v. Andrews*: referred to, *post*.

Lord Cottenham in *Sawyer v. Birchmore*, 3 M. & K. pp. 576—577 (cited by Baggallay, L. J. in *Kennedy v. Lyell*, 23 Ch. D. p. 401, and see further as to *Sawyer v. Birchmore*, *ante*, p. 435) drew a distinction between questions seeking information as to matters of fact as distinguished from confidential communications. But qu. whether *Bramwell v. Lucas* bears on this point as suggested by Lord Cottenham: see *post*, p. 441.

Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. p. 104, thus states the ground on which in certain cases the claim of privilege was disallowed. "Where there could not be said in any correctness of speech to be a communication at all: as where for instance a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other (see also a passage in *Bramwell v. Lucas*, referred to *ante*, p. 434, but qu. as to this ground) man would have been equally cognisant, and even this has been held privileged in some of the cases."

In *Ex parte Campbell*, L. R. 5 Ch. p. 705, James, L. J. considered that it was not sufficient to protect a solicitor from disclosing his client's residence that it came to his knowledge in his professional capacity and in consequence of his employment as his solicitor, but that it must have been communicated to him confidentially and as a secret for the purpose of being advised by him, and that generally a solicitor was only protected from discovering some

matter communicated to him sub sigillo confessionis (see also *Dwyer v. Collins*, 7 Exch. p. 746, "a secret directly or indirectly communicated to him in professional confidence," and *Greenough v. Gaskell*, 1 M. & K. p. 104, "in its nature private and the subject of a confidential disclosure"), that is some fact which the client had communicated to him for the purpose of obtaining his professional advice and assistance and not collateral matters. But see *ante*, p. 431, as to this test.

In *Lonsdale v. Heaton*, referred to *ante*, p. 433, Alexander, L. C. B. at p. 78 observes that many of the questions put could not have been the subject of communication, at least of privileged communication: for instance the time and place of D.'s death and his state of health, &c.; and that this information even if obtained as solicitor could not be said to be privileged: see also *ante*, pp. 360—362, discussing *Kennedy v. Lyell*.

In *Gibbon v. Strathmore*, 11 L. J. Ch. 366, the defendant's solicitor was interrogated as witness whether the plaintiff had acted as adviser and agent for the defendant Lady Glamis in the estate and affairs of her deceased husband. He demurred on the ground that he was employed professionally by the plaintiff and defendant in various matters connected therewith, and that all his information was derived from communications confidentially made to him by the defendant or plaintiff as their solicitor, and that the disclosure would be a breach of professional confidence. His demurrer was allowed. In argument some stress was laid on the word "or:" but it was said that he was not bound to distinguish from whom he got it. But qu. if he had got it from and as the solicitor of the party seeking the disclosure, see *ante*, p. 427.

In *Dwyer v. Collins*, 7 Exch. p. 646, it is said that the privilege does not extend to any matter of fact which the attorney knows by any other means than by confidential communications with his client though if he had not been employed as attorney he would probably not have known it. So in Bull. N. P. 284, it is stated that the privilege does not cover a fact of his own knowledge and of which he might have had (said to have no larger meaning than "had" in *Davies v. Waters*, 9 M. & W. p. 610, and see *Wheatley v. Williams*, *post*) knowledge without being counsel or attorney in the cause, and that an attorney may be asked as to a rasure in a deed or will or whether he had ever seen it in any other plight for that was a fact of his own knowledge: but in *Cutts v. Pickering*, 1 Vent. 197, no such disclosure would have been ordered if the knowledge had been acquired after retainer: and see *Robson v. Kemp*, *post*, p. 438. And so in *Lord Say's case*, 10 Mod. 40, referred to in *Greenough v. Gaskell*, p. 108, it was held that he might be asked whether a deed was not executed until five months after date, for it was not a secret of his client's, but it might have come to his knowledge without his client's acquainting him, and was of that nature that an attorney concerned or anybody else might inform the court, but that he ought not be permitted to discover any confessions his client might have made to him on that head. And Lord Mansfield in *Doe d. Jupp v. Andrews*, Cowp. p. 846, considered that an attorney had no privilege to refuse to give evidence of collateral facts.

Lord Abinger refers to the passage in Bull. N. P. in *Wheatley v. Williams*, 1 M. & W. p. 541, and restricts it to a case where the attorney has information independently of any communication from the client, and considered that it could not mean that where the attorney coming to the client for a confidential purpose obtains some other collateral information which he would not otherwise have possessed he could be compelled to disclose it: and that suppose an attorney while searching for one of his client's deeds finds another deed which might operate to his client's prejudice, must he disclose it. And in this case, the question being whether a document shown him in a professional interview was then stamped, he considered that if a document were shown to an attorney in pursuance of a confidential consultation with his client all that appeared on its face was a part of the confidential communication (and see *post*, p. 439). And Alderson, B. considered that the privilege extended to all knowledge that the attorney obtained which he

would not have obtained but for his being professionally consulted by his client.

In *Coleman v. Orton*, 9 L. J. Ch. 268, a solicitor, being asked in whose possession or custody a certain document was and when and where he last saw it (see also *ante*, p. 426), objected to answer on the ground that his own knowledge was derived from his client in the capacity of his solicitor: he was protected. In *Turquand v. Knight*, 2 M. & W. 98, where the question was whether a lease had been deposited with the defendant by a bankrupt before or after his bankruptcy, an attorney was protected from answering whether the lease was not in his client's possession when he came to him after the act of bankruptcy and whether he had not brought it for the purpose of raising money: for where, it was said, per Alderson, B. p. 101, the communication made relates to a circumstance so connected with the employment as attorney that the character formed the ground of the communication it is privileged from disclosure; (and the business of a scrivener was considered within the privilege, see *ante*, p. 376). On the other hand in *Eicke v. Nokes*, 1 Moo. & M. 305, an attorney's clerk was ordered to answer whether the defendant his client had given him a copy of a bill.

In *Re Land Credit Society of Ireland*, 15 W. R. 703, a solicitor, present when securities were delivered to his client, was ordered by Lord Romilly to disclose by whom they were delivered on the ground that it was not information communicated to the solicitor by the client but was obtained independently by the evidence of his own eyes: but qu. see *Robson v. Kemp*, *post*.

In *Brown v. Foster*, 1 H. & N. 736 (an action for malicious prosecution on the ground of a charge brought against the plaintiff before a magistrate) it was suggested that an entry had been made in a certain book after the proceeding before the magistrate. The gentleman who had acted as counsel for the plaintiff before the magistrate was called, and was held bound to say what was the state of the book when produced on that occasion, for he had not learnt it or acquired a knowledge of the contents of the book from his client. It was said by Pollock, C. B. in this case, p. 739, that he might give evidence of a fact which was patent to his senses: and see *ante*, p. 436.

It was said by Martin, B. in the same case that "the counsel cannot refuse to answer with respect to matters which he sees with his eyes": and see *Re Land Credit Society of Ireland*, *ante*. But qu. In *Robson v. Kemp*, 5 Esp. p. 55, referred in *Greenough v. Gaskell*, 1 M. & K. p. 106, it is laid down that one sense is privileged as well as another, and that he cannot be said to be privileged as to what he knows but not as to what he sees, where the knowledge acquired as to both has been from his situation as attorney, and accordingly, the attorney being asked as to the destruction of a deed, and it appearing that what he knew concerning it had been acquired from being called in as attorney and not by any other mode, he was protected, for this was a transaction with which he had only become acquainted from being employed as attorney and the act could not be stripped of the confidence and communication as an attorney, he being then acting in that character.

He is bound to prove his client's handwriting: *Dwyer v. Collins*, 7 Exch. p. 646: *Hurd v. Moning*, 1 C. & P. 372: for it is no breach of confidence: *Bowles v. Stewart*, 1 Sch. & Lef. p. 226: and for the same reason to prove his client's identity as the person who put in an answer, for it was not in the nature of a confidential communication between attorney and client, but a fact easily cognizable to the witness and to many other persons without any confidence on the subject being reposed in him: *Studdy v. Sanders*, 2 Dow. & R. 347: not a matter confidentially disclosed to him: *Greenough v. Gaskell*, 1 M. & K. p. 108, referring to *Studdy v. Sanders*, and disapproving *Rex v. Watkinson*, 2 Str. 1122, contra: and see *Doe d. Jupp v. Andrews*, where Lord Mansfield said he had known an attorney examined to prove that his client swore and signed an answer in chancery on which he was being indicted for perjury: and see *Dwyer v. Collins*, 7 Exch. p. 646: *Vailliant v. Dodemead*, 2 Atk. 523. In *Parkins v. Hawkshaw*, 2 Str. 240, however he was not allowed to give evidence as to communications with his client in order to prove his identity.



He has been held not bound to discover his client's abode that he might be taken in execution: *Hooper v. Harcourt*, H. Blackst. I. 534: nor that he might be served with a subp. duc. tec.: *Heath v. Crealock*, L. R. 15 Eq. 257. But qu. whether these decisions can stand after *Ex parte Campbell* in the Court of Appeal, L. R. 5 Ch. 703, referred to *ante*, p. 436. But no solicitor is at liberty in consequence of any privilege of the client directly or indirectly to conceal any fact which will enable the court to discover the residence of its ward of court, and he must produce documents (here envelopes with post-marks on them) for this purpose: *Burton v. Darnley*: *Ramsbotham v. Senior*, L. R. 8 Eq. 575, 576.

In a suit for specific performance by vendor against purchaser the purchaser's solicitor was held bound as witness to answer whether any objections to title had been made by him on the purchaser's behalf, for that was a distinct fact, like for instance the execution of a deed, which he could not object to prove for the benefit of third parties, though the effect might be to destroy the client's interests: but otherwise whether the objections had been waived, for that might be the effect or result of a course of conduct or series of transactions, and might be only the expression of his opinion: *Tristram v. Roberts*, 10 Jur. 125. Qu. whether it would not be obligatory to give discovery of this nature, as being communications to an opposite party, see *ante*, p. 433.

The fact of retainer of counsel was considered not to be in the nature of a privileged communication by Parke, B. in *Forshaw v. Lewis*, 1 Jur. N. S. p. 264; 7 Exch. pp. 715—716: but see *Foot v. Hayne*, 1 C. & P. 545, where it seems to have been considered that evidence of retainer and of the date of such retainer was within the rule of confidential communications.

An attorney has been held bound to disclose the name of the person employing him to conduct the cause, the object being to discover the real defendant in order to let in the declarations and admissions of the real party interested: *Lery v. Pope*, 1 M. & M. 410: and see *ante*, p. 89, referring to *Sketchley v. Connolly*: (but see also *ante*, pp. 376, 428, as to discovery of client's names): and to state whether certain persons employed him as their attorney in their character of executors: *Beckwith v. Bonner*, 6 C. & P. p. 682: and see *Gillard v. Bates*, referred to *post*, p. 442. In an American case, *Chiras v. Reinicker*, 11 Wheat. 280, it was considered, pp. 294—295, that it would be no breach of professional confidence for the witness to answer whether he was employed as counsel to conduct an ejectment action, for it only established the relation, but it was held that it would be so to answer whether he was employed by him as landlord of the premises, for it involved a disclosure of his title and claim. See also *Tristram v. Roberts*, *ante*: *Gibbon v. Strathmore*, *ante*, p. 437: and *Sawyer v. Birchmore*, *ante*, p. 435.

In *Marriott v. Anchor, &c. Co.* 3 Giff. 304, a solicitor being asked to whom he had made certain applications answered, "What I did I did as the plaintiff's solicitor": he was protected, though otherwise if it had come out that he obtained the names aliunde: but see *Sawyer v. Birchmore*, *ante*, p. 435.

In *Sandford v. Remington*, 2 Ves. jun. 189, it was held that a solicitor must answer as to being sent with orders to execute a judgment, for it was an act. And so as to being directed by his client to send some one with the sheriff to point out the person to be arrested under a cap. ad sat.: *Caldbeck v. Boon*, 7 Ir. R. C. L. 32, referring to *Sandford v. Remington* and *Gillard v. Bates*, cited *post*, p. 442: a direction to the attorney to issue execution being a professional communication, but anything beyond that being outside the scope of his employment: *ibid.* p. 36: and see a passage in *Bramwell v. Lucas* referred to *ante*, p. 434: and see generally as to what is within the scope of professional employment *ante*, p. 373 to p. 377: and see *post* (c).

He is privileged from disclosing the contents of documents entrusted to him in his professional capacity (or "collaterally" known to him, see *Wheatley v. Williams*, *ante*, p. 437), and which he is acquainted with only by virtue of professional confidence: *Dwyer v. Collins*, 7 Exch. p. 646: *Davies v. Waters*, 9 M. & W. 608: *Bate v. Kinsey*, 1 C. M. & R. p. 43: *Phill. Evid.* p. 114: *Wright v. Mayer*, 6 Ves. 280—281: and see *Chant v. Brown*, 7 Ha. p. 82: of

an abstract made by him: *R. v. Upper Bodington*, 8 D. & R. 726, p. 732: of a deed the only knowledge of the contents of which he had obtained by reading it over at a consultation with counsel: *Davies v. Waters*: of an account book sent to him by his client in answer to a request for information in order to prepare a case for counsel: *Cleave v. Jones*, 21 L. J. Ex. 105: 7 Exch. 428: and see as to a will *Doe d. Carter v. James*, 2 M. & R. 47. Or matters which he only knows by means of such contents: *Mills v. Oddy*, 6 C. & P. p. 731: as for instance that his client had no power to grant a lease: *Moore v. Tyrrell*, 2 B. & Ad. 870, p. 878: or as to the existence of charges on an estate: *Marsh v. Keith*, 1 Dr. & Sm. 342. Or from answering any questions respecting the document: Cresswell, J. in *Volant v. Soyer*, 13 C. B. 231, p. 236, where the question was "what was the deed." But see *ante*, p. 426, as to disclosing the whereabouts and giving a list of his client's documents. In *Brand v. Ackerman*, 5 Esp. p. 120, Lord Ellenborough held that where a question was put as to the existence of a certain bill and as to the names times and dates, that was not a mere fact but consisted of circumstances which the attorney came to be acquainted with from the delivery of the bill to him by his client, and was a communication to him from his client which he was bound not to disclose. But he was held bound to show the indorsement on a deed in order to prove its identity where it did not involve a disclosure of the contents: *Phelps v. Rew*, 3 E. & B. 430: and see *Brown v. Foster*, *ante*, p. 438, referring to this case: and generally it would seem, see *ibid.* p. 439 (but see *Peter v. Watkins*, *post*, p. 443), it must be produced for the purpose of identification by any means so long as the contents are not disclosed. Where a party placed a forged will amongst some documents and sent them to his attorney for the ostensible purpose of asking his advice upon them, but, as it pretty clearly appeared, that the attorney might find the will and act upon it, which he did, it was held that it was not put into his hands in professional confidence and might therefore be read in evidence: *R. v. Hayward*, 2 C. & K. 234; qu. whether if a document be given by the client to his attorney to be shown to a particular person: see *R. v. Tilney*, 18 L. J. Mag. Cas. p. 38: or to intending purchasers for the purpose of a sale and therefore in effect to the world: see *Doe d. Marriott v. Hertford*, cited *ante*, p. 375, it is privileged: and see *ante*, pp. 366, 378: the solicitor is there only the medium of communication: see *ante*, p. 433. It seems that the privilege remains though the document has already been made public by production in court in a previous action: *R. v. Hawkins*, 2 C. & K. 823, where the document had been entrusted to him for the purpose of conducting that action: or before a master in chambers in another suit (vouchers) *R. v. Dixon*, 3 Burr. 1687 (cited *ante*, p. 356): and see *R. v. Smith*, reported in Phill. Evid. p. 119. It must be remembered that with regard to the production of a client's documents the question is so far as discovery is concerned one of property: see *ante*, p. 429.

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(c) *Miscellaneous.*

The communication from the client to the attorney must be for the purpose of obtaining legal advice and not for information as to matters of fact: *Greenough v. Gaskell*, 1 M. & K. pp. 114—115: *Desboro' v. Rawlins*, 3 M. & C. p. 521: *Sawyer v. Birchmore*, 3 M. & K. pp. 576—577: *Bramicell v. Lucas*, 2 B. & C. 745: and see *ante*, p. 436. But it is clear, see *ante*, pp. 413—416, that this must not be applied to infor-



mation obtained for the purpose of litigation or at any rate as materials for evidence.

In *Bramwell v. Lucas*, 2 B. & C. 745, it was held that where a bankrupt had asked his solicitor whether he could safely attend a meeting of his creditors without being arrested and the solicitor recommended him to stay where he was till the fact should be ascertained, the question was one seeking information as to a matter of fact and not of law, and the answer was not legal advice. This decision however was regarded by Lords Brougham and Cottenham as somewhat of a refinement, even if it was not actually disapproved: see *Greenough v. Gaskell*, pp. 114—115; *Desboro' v. Rawlins*, pp. 521—523; *Sawyer v. Birchmore*, pp. 576—577.

In *Sawyer v. Birchmore*, pp. 576—577, Lord Cottenham refers to *Bramwell v. Lucas* as an authority for the proposition that the solicitor must answer questions seeking information as to matters of fact as distinguished from confidential communications; but the propositions seem entirely distinct, see *ante*, p. 436.

The privilege does not cover everything the knowledge of which the solicitor has acquired while acting as the solicitor of the party whether connected with or having reference to such employment or not: *Thomas v. Rawlins*, 27 Beav. 146: *Greenough v. Gaskell*, 1 M. & K. p. 104: and see *ante*, p. 435, referring to *Marsh v. Keith* and *Kennedy v. Lyell*.

The communication must be made to the legal adviser in his professional capacity: see *ante*, p. 372. Therefore no privilege attached to a remark made by the plaintiff to the attorney after the successful compromise of an action upon a note to the effect that he was glad the action was settled, for he had only given 10% and his note for it and knew it was a lottery transaction: for it was not communicated in confidence as instructions for conducting the cause or for any purpose of business, but was a mere *gratis dictum* or by way of idle and useless conversation or exultation: *Cobden v. Kenrick*, 4 T. R. 431, referred to in *Greenough v. Gaskell*, 1 M. & K. p. 109. So in *Annesley v. Anglesea*, cited *ante*, p. 356, the prosecutor's attorney was held bound to state that pending proceedings on the indictment his client had observed to him that he would give a large sum to have the prisoner hanged. In *Gillard v. Bates*, 6 M. & W. 547, it was said by the court, p. 548: "The privilege does not attach to everything which the client says to the attorney: the test is whether the communication is necessary for the purpose of carrying on the proceedings in which the attorney is em-

ployed: if it is necessary it becomes privileged." But qu. whether "necessity" is the test: see *Cleave v. Jones*, 21 L. J. Ex. p. 108, where Martin, B. considers that if the communication were made bonâ fide by the client, he thinking it was necessary, it is privileged though the client may be in error in considering it necessary. In *Gillard v. Bates*, the question in the action being whether the plaintiff, a solicitor, had been employed by the defendant or another person, the plaintiff's solicitor was held bound to answer whether the plaintiff had not said to him on a particular occasion that he was employed by this other person.

Where the professional legal adviser witnesses a document.

Where the attorney makes himself a subscribing witness and thereby assumes another character for the occasion, adopting the duties which it imposes he becomes bound to give evidence of all that a subscribing witness can be required to prove: *Greenough v. Gaskell*, 1 M. & K. pp. 104, 108: of all that passed in his presence at the execution of the deed, or at the time respecting the execution: *Robson v. Kemp*, 5 Esp. p. 54: *Sandford v. Remington*- 2 Ves. jun. 189: not of course what took place in the concoction and preparation of the deed, or at any time and not connected with its execution: *Robson v. Kemp*, p. 54: not the private conversation as to the deed with regard to what was communicated as the reason for making it: *Sandford v. Remington*, p. 189. He makes himself as has been said a public man and pledges himself to give evidence: *Robson v. Kemp*, p. 54: *Greenough v. Gaskell*, pp. 108—109; *Doe d. Jupp v. Andrews*, Cowp. p. 846: see also *Tristram v. Roberts*, ante, p. 439.

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V. *Where the same Solicitor acts for Two Persons in some Transaction such as Mortgagor and Mortgagee in a Mortgage, or Vendor and Purchaser in a Sale.*

Some practical difficulty arises in cases of this kind in determining whether his knowledge is derived in his capacity as solicitor for the one party or the other, or both.

If the party employs an attorney who is also employed on the other side the privilege is confined to such communications as are clearly made to him in the character of his own attorney: *Perry v. Smith*, 9 M. & W. p. 683.

In *R. v. Avery*, 8 C. & P. 596, where the same solicitor acted for both lender and borrower, he was held bound to produce the will under which the latter claimed the interest proposed to be mortgaged and to give evidence of what was said to him as to the loan: see also *R. v. Farley*, 2 C. & K. 313, referred to ante, p. 376.

In *Perry v. Smith*, an action to recover the purchase-money of property sold by the plaintiff to the defendant, the evidence of the attorney who had acted for both parties, to the effect that the defendant applied to him to postpone payment of the purchase-money, was received, for it was said to him in his adverse character of attorney for the vendor.

In *Baugh v. Cradocke*, 1 M. & R. 182, a creditor wrote to the person acting as attorney for both himself and his debtor, pressing him as his attorney to get payment, complaining of his backwardness from being also the debtor's attorney, and making an offer as to the mode of payment. It was held that the letter containing this offer to be made to the debtor was not a communication to him in his single character of the creditor's attorney.

In *Doe d. Peter v. Watkins*, 3 Bing. N. C. 421, an attorney was employed by a mortgagor to raise a sum of money, and received from him the abstract of title of the property: no money was advanced. He was not permitted to identify the abstract. At p. 425 it was said that the question was whether he was speaking to a transaction in which the relation of attorney and client existed between him and the mortgagor, that he was not the less employed by the mortgagor because he was employed by others to lay out money, that in asking for the abstract he was acting as the attorney of both and therefore could not disclose communications made to him as attorney for the mortgagor, and that it would be dangerous if when the same professional man was employed he were permitted to disclose the communications made to him by either side.

*Taylor v. Blacklow*, 3 Bing. N. C. 235, may also be referred to where the attorney acting for both lender and borrower had disclosed to the former the defects of the borrower's title.

## CHAPTER III.

## DISCOVERY OF THE EVIDENCE OF A PARTY'S CASE.

A PARTY is not compelled to give discovery of the evidence of his case (objection (3), see *ante*, p. 310).

This objection is put in the following form in the third proposition in Wigram at p. 261: the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case and does not extend to a discovery of the manner in which the defendant's case is to be established or to evidence which relates exclusively to his case. And the learned author also uses the following expressions: Pl. 375, discovery appertaining to the defendant's case alone: Pl. 346, discovery relating exclusively to his case: the evidence by means of which that case is to be established.

The condition that the evidence must relate "exclusively" to the party's own case has been omitted in the form of objection stated above for two reasons: first, that evidence which does not exclusively relate to the party's own case cannot strictly be said to be evidence of his case only, and is therefore not within the terms of the objection: second, that the condition of exclusive relation while applicable to some documents is not applicable to other documents, or rather is applicable only in a totally different sense: see *post*, p. 477.

As to the limitation of a party's right of discovery to material facts relating to his own case it has been pointed out (*ante*, p. 11) that it is preferable to refer the relevancy of discovery to the matters in question rather than the party's case.

The proposition that the right of discovery does not extend to the manner in which the opponent's case is to be established is objectionable on account of its ambiguity. In one sense undoubtedly a party is not bound to disclose the manner in which he is going to establish his case: it would be equivalent to a disclosure of the evidence that he intends to adduce in support of his case. But in another sense, and in this sense it is used in Redes. Pl. 9, such discovery is not protected: he is bound to discover what his case is, according to the modern practice at all events; see this point further discussed, *post*, p. 447. The expression is also used in some common law cases: see *post*, p. 447.

As to the proposition that discovery appertaining or relating exclusively to the party's own case is protected as distinguished from the evidence of that case, the following observations may be made. In the first place the learned author (and so Mr. Hare in his book on Discovery, pp. 183—187) uses the expression evidence or evidences to denote any discovery which can be required either by way of answers to interrogatories or production of documents, whether the answers or documents be strictly evidence or not. In the second place a party is (see *ante*) bound to discover what his case is. For these reasons therefore it seems preferable to express this ground of protection in the form adopted above, it being understood that "evidence" includes matter or documents not in themselves strictly evidence of the party's own case.

In Redes. Pl. 190, this limitation of the right to discovery is put thus. "Where the title of the defendant is not in privity but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evi-

dence of the title under which he claims." Mr. Hare, at p. 109, justly disapproves of this statement of the limitation: for the question is whether the matters or writings constitute evidence solely of the party's own title; the existence or non-existence of privity is not the criterion.

The grounds for this exception or privilege are that, if it did not exist, it would be opening a wide door to perjury by enabling the opponent to collect evidence to contradict it: see Wigr. Pl. 7, 347: *Plummer v. May*, 1 Ves. 426: *Bligh v. Benson*, 7 Pri. p. 207. If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage: he may then be able although he has no evidence in support of his own case to shape his case and his evidence in such a way as to defeat entirely the ends of justice: Jessel, M. R. in *Benbow v. Low*, 16 Ch. D. p. 95. One party is not entitled to see the other party's brief: *ibid.* pp. 98—99: and see *post*, p. 453, and *ante*, p. 407.

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## PART I.

### DISCOVERY OF THE EVIDENCE OF A PARTY'S CASE IN ANSWER TO INTERROGATORIES.

In discussing this (see *ante*, p. 444) limitation of or exception to the right of discovery in its application to production of documents the necessity is pointed out of separating documents into two classes for this purpose: see *post*, p. 447. This difference of treatment does not seem practically necessary in the case of interrogatories. There may be however cases in which the validity of a claim to protection against answering interrogatories may be tested by conceiving the matter to be contained in a document and considering whether the document would be protected. For this purpose a reference to the distinction necessary to be drawn in the case of documents may usefully be made: see also as to interrogatories inquiring into the contents of documents, *post*, p. 473.

There are two perfectly legitimate provinces of discovery

the distinctions between which and the above proposition have occasioned and must always occasion considerable difficulty in practice. These two provinces are discussed in the following sections A. and B.

*A. As to Discovery of the Adversary's Case.*

For certain purposes discovery of the nature of the adversary's case or of the facts on which he relies is permissible: (as to discovery of the nature of his title in actions for the recovery of land, see *post*, pp. 524, 529: or for the recovery of property, *post*, p. 516).

In Wigr. Pl. 372, citing a passage in Redes. Pl. referred to *post*, the learned author regards this as a function of pleading and not of discovery: and in fact the propositions of his book are framed on that footing: see *ante*, pp. 11, 444: see also *post*, p. 531, discussing Wigr. Pl. 379—382, where he regards discovery of the nature of the adversary's title as inadmissible except in certain special cases. No doubt as a matter of pleading each party is entitled to know what his adversary's case is in order that he may know with certainty what case he has to meet: see Wigr. Pl. 372: and James, L. J. in *Saunders v. Jones*, 7 Ch. D. p. 447. It is clear however from the authorities, *post*, that within certain limits the machinery of discovery may be used in this direction.

Although the adversary need not discover the evidence which he proposes to adduce he must discover the facts on which he relies to establish his case: see Cotton, L. J. in *Eade v. Jacobs*, 3 Ex. D. p. 337, and *A. G. v. Gaskill*, 20 Ch. D. p. 529: *Bradbury v. Cooper*, *post*, p. 473: *Ashley v. Taylor*, *post*, p. 454: Brett, M. R. in *Bolckow v. Fisher*, 10 Q. B. D. pp. 169—170; and in *Phillips v. Phillips*, 4 Q. B. D. pp. 133—134: and Lord Cottenham in *A. G. v. Corp. London*, 2 M. & G. p. 257: and see *post*, pp. 452—453, referring to *Saunders v. Jones*: *Commissioners of Sewers v. Glane*: *Marquis of Bute v. Lewis*: and *Benbow v. Low*; and see *Millington v. Loring*, 6 Q. B. D. 190, where any facts which a party was entitled to prove at the trial, pp. 194, 196, (as here the fact of seduction in a breach of promise action),

446. *Under heading A.*

In a recent case of *Bidder v. Bridges*, 29 Ch. D. 29 : 33 W. R. 792 : 52 L. T. 455, Kay, J., referring to the below-cited dictum of Cotton, L. J. to the effect that the party must discover the facts on which he relies as distinguished from his evidence, refused to recognise it as a general proposition ; he also apparently refused to admit the right of a party setting up a purely negative case to any discovery tending to impeach or destroy the adversary's case (see this subject discussed *post*, pp. 458—465) and in fact to any discovery at all. The interrogatories which the learned judge considered inadmissible were, however, substantially allowed by the Court of Appeal no formal judgment being delivered.\*

The judgment of Kay, J. is of some length, and the author ventures to make the following criticisms upon it. The learned judge, at p. 34, adopts as a starting point the

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\* The plaintiffs claimed commonable rights over a piece of land as part of M. Common, pleading the exercise of the rights from time immemorial, and one of them suing as owner in fee of certain houses: the defendant, lord of an adjacent manor, said that the piece of land never formed part of M. Common, but was common land of his own manor, that any rights that the plaintiffs might have had had been extinguished, that some of them could only be used in respect of ancient tenements, and that the particular houses had no land held therewith. The interrogatories are set out as settled and altered by the C. A. on p. 46: substantially they were as *post*, the parts in italics being struck out by the C. A.: the only one held to be admissible by Kay, J. was that asking whether any lands were held with the houses, a substantive case to the effect that there were no such lands being set up in the defence: to the others considering that they did not seek discovery in support of any substantive case, but asked as to the facts on which the plaintiffs must rely to make out their own case, and that they in effect asked what evidence the plaintiffs had in support of their case, in particular with respect to the acts of user: see pp. 43, 44. How long have you been proprietors or occupiers of the houses, and for what estates or interests, and what is the tenure thereof? In or of what manors are or were they, and when last, situate or held? Which of the manors of M. &c. extend, as you allege, over the piece of land? Are any and which of the messuages held by you ancient messuages, or how otherwise, and when were they built? Have the houses any and what lands held with them? Have you or your predecessors, as proprietors or occupiers of any and what lands or tenements in the parish of M. or under any other alleged title or in any other capacity, exercised particular commonable rights describing them over any and what parts of M. Common, and of the piece of land? If yea, set forth the instances with dates, and whether the same were by any and what license, or for any and what payment, and for what purpose such gorse, &c. was applied?



446. *Under heading A.—continued.*

propositions laid down in Wigram: the author has given his reasons *ante*, pp. 11, 12, 444, for not regarding them as expressing satisfactorily the true limit of the right of discovery under the present practice: and as to their citation by Lord Selborne in *Lyell v. Kennedy*, the author refers to the note *post*, p. 527. The learned judge then, pp. 36, 37, refers to the above-cited dictum of Cotton, L. J. and justifies it solely on the ground that the defendant's pleading in that case was defective, and the discovery was in the nature of further particulars, and considers that to ask a plaintiff who has properly pleaded his case upon what facts he relies to make it out is only another way of asking what is his evidence. He then, pp. 37—39, cites the following cases in support: *Ivy v. Kekewick*, which was a case of a plaintiff interrogating a defendant in possession and can well be supported on that ground, see *post*, p. 528: *Ingilby v. Shafto*, as to which see *post*, p. 448: *Commissioners of Sewers v. Glassey*, as to which (see *post*, p. 452) it must be admitted that it is not easy to distinguish the interrogatories there considered inadmissible from some of those allowed in this case.

The learned judge then, pp. 39—41, 44, considers the other proposition (see *post*, p. 458), namely how far a party who merely traverses his adversary's case without setting up any substantive case of his own is entitled to interrogate for the purpose of destroying his adversary's case, and considers that such a proposition is a contradiction of the rule that questions must be confined to those which establish his own substantive case. He observes that *Loundes v. Davies*, discussed *post*, p. 530, was disapproved of by Wigram; he refuses to recognize the dictum of Giffard, L. J. in *Hoffmann v. Postil*, discussed *post*, p. 467, to the effect that a defendant had in this respect a larger right of discovery than a plaintiff, except as applicable to the particular case of a defendant interrogating to show that a patent is void for want of novelty: and as to *A. G. v. Gaskill* points out, at p. 42, that the actual interrogatories were for the purpose of obtaining admissions of the case of the interrogating party.

or on which the jury might act in assessing damages, p. 196, were held to be material facts to be stated in the pleadings under Ord. XIX. r. 4, and it is conceived (see p. 195) facts to which the adversary might interrogate to prevent their being sprung upon him at the trial without notice.

An answer\* was required according to Redes. Pl. 9 (among other things) in order to obtain a discovery of the points in the plaintiff's case controverted by the defendant, and of the grounds on which they are controverted (see *Robson v. Brougham*, 19 L. J. Ch. 465, grounds on which executors resisted plaintiff's claim), and of the case on which the defendant relies, and of the manner in which he means to support it, or (in a suit to protect the plaintiff against a future injury) a discovery of the defendant's claims and of the grounds on which they are intended to be supported. Some of these expressions have been subjected to considerable criticism: see Wigr. Pl. 372: *A. G. v. Corp. London*, 2 M. & G. pp. 257—258. And it is clear that they must not be taken to warrant any discovery which goes beyond a discovery of what the adversary's case really is: see Wigr. Pl. 372; or under what title he claims: see *A. G. v. Corp. London*, p. 263: but see *post*, pp. 524, 529, as to discovery of the nature of a party's title to land. Lord Cottenham considers, p. 258, that a party is entitled to know what his adversary's case is and how he makes it out, but not to see the proofs by which that case is to be established: (see further as to this case *post*, pp. 459, 505). The expressions "manner of supporting" or "establishing" or "making out" or "shaping his case" are ambiguous. In one sense it is clear that the party is not bound to make such discovery: where that is to say it is tantamount to asking him what evidence he is going to use or what witnesses he is going to call. See the following cases referred to *post*: *Ingilby v. Shafto*, *post*: *Edwards v. Wakefield* and other cases, p. 451:

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\* It must be remembered that the answer in the times of Lords Redesdale and Cottenham comprised both the defence and the discovery whereas now the defence is stated separately: see *post*, p. 448, as to this.

*Hunt v. Hewitt*, p. 451: *Towne v. Cocks*, p. 458; where these expressions are used: and see *ante*, p. 444.

In a case of *Ingilby v. Shafto*, 33 Beav. 31, a bill of discovery filed by a defendant in aid of his defence to an action of ejectment, Lord Romilly confined his right to discovery within very narrow limits. It seems however that he considered that the rights of a party filing a bill of discovery in aid of the prosecution of or defence to an action at law were not on a par with the rights of a plaintiff seeking relief in equity and discovery in aid of that relief, in the latter case considering that he might call upon the defendant within certain limits to state (p. 40) how and on what grounds he opposes the relief asked, because in such a suit the plaintiff could disprove the whole of it, each party being obliged to plead his own case in order that the other may not be taken by surprise, in the former case (pp. 40, 42) limiting the discovery to such documents and facts as would assist him in making out his case at law, and considering the province of discovery in equity (that is it seems in aid of an action at law) was not (pp. 39, 41) to compel a party to state how he intends to frame his case, or to argue it on the facts which are known to all or to deal with a certain set of materials or whether he intends to dispute one proposition or another. Accordingly he refused to compel the plaintiff in the action to answer whether and on what grounds he impeached a certain deed alleged to establish the defendant's title, in what character he claimed, or whether he had not in his possession documents which would show that the estate did not descend on him as he alleged, or to discover his pedigree and other matters (see as to discovery of the nature of a plaintiff's title *post*, Part III. Sect. II.); and in particular p. 531, referring to this case. No such limitation of the right to discovery in aid of the defence to an action at law was suggested in *Glascott v. Copper, &c. Co.* cited *post*, pp. 459, 462.

Discovery of the facts on which the adversary relies in support of his case or of the nature of his case may legitimately be required for two objects: (a) he may use the machinery of discovery, the pleadings not being on oath, in order to compel his adversary to pledge his oath to the truth of his case and so obtain such admissions as to a greater or less extent may save the obligation of proof: see *A. G. v. Gaskill*, *post*, and *ante*, pp. 1—2: and in order, see Wigr. Pl. 345, 402 (and see the suggestion referred to *ante*, p. 245) to exclude the possibility of his availing himself of a claim or defence which he may know to be unfounded in fact: and see the following cases: *Lowndes v. Davies*, *post*, p. 530: *O'Connor v. Malone*, *post*, p. 530: and *Flanagan v. Williams*, *ante*, p. 304: to search his conscience, as it has been said: see *Lyell v. Kennedy*, 9 App. Cas. pp. 85, 86: and *post*, p. 450: (b) he may use it in order to get fuller information as to the adversary's case than is or is likely to be contained in his pleadings (and, see *ante*, p. 112, more

especially under the form of pleading now in use under the new rules): see *A. G. v. Corp. London*, 2 M. & G. p. 257: *Eade v. Jacobs*, cited *post*, p. 457: and see *post*, p. 450.

(a) See *ante*.

This office of discovery however seems to have been denied by Bacon, V. C. in the cases of *John v. James*, 13 Ch. D. 370, and *A. G. v. Gaskill*, 20 Ch. D. 519. In the former case he refused to compel the plaintiff to answer whether certain allegations in his statement of claim were true: in the latter case, an action by a local board against a person for building across a footpath over which there was an alleged public right of way, he refused to compel the defendant to answer interrogatories inquiring in detail as to the existence of this right of way, on the ground that he had already denied its existence altogether in his defence, being in fact the same ground as that on which he based his decision in *John v. James*. The case of *A. G. v. Gaskill* came before the Court of Appeal and the decision of Bacon, V. C. was reversed, Jessel, M. R. observing, p. 525, that the doctrine adopted by the vice-chancellor was new to him: and see Cotton, L. J. p. 529.

But a party will not always be justified in making his adversary swear to the truth of every allegation in his pleading: see Cotton, L. J. *ibid.* p. 529: and Lindley, L. J. *ibid.* p. 530: and it was said, *ibid.* pp. 527, 529, that Ord. XXXI. r. 2 (the present rule 3, see *ante*, p. 107) might be used for the purpose of ordering him to pay the costs of such unnecessary interrogatories: and see *ante*, p. 107, as to the provisions of the new rules in regard to prolix and unnecessary interrogatories.

See *McCorquodale v. Bell*, W. N. 76, p. 39, where, the defendant having denied a general charge of conspiracy, the plaintiff (after issue joined) was allowed to interrogate as to details to prove the conspiracy: *Mary or Alexandra*, cited *post*, p. 462; *Grattan v. Wall*, Ir. Rep. 2 C. L. 80, action for rent by a lessor against a person whom he alleged to be assignee of the lease, where the defendant denying that the lease was vested in him was compelled to answer whether he had not become possessed of the lease by some and what instrument of assignment but not "how otherwise, &c." See as to discovery of the nature of a party's title *post*, Pt. III. Sect. I. (c) and II. See other cases in illustration *post*, p. 457.

Interrogatories may be properly put to call the adversary's attention to matters as to which he might otherwise state that he was unable to afford information: see *Redes*. Pl. 45; and which he might have passed over by a general allegation in his pleadings: see *ante*, p. 133.

Under the old chancery practice where the defendant put in a plea, the plaintiff was entitled to an answer on oath from him as to facts charged in the bill though they had been already generally denied by the plea: *Dan. Ch. Pr.* 529.

Where a defendant pleaded infancy it was held legitimate to interrogate to ascertain the date of his birth by requiring particulars of the certificate of his birth and baptism: *Anon.* 27 S. J. 327. See as to discovery from an infant defendant, *ante*, p. 61.

At common law also (see *post*, p. 460, discussing the common law practice of interrogatories) this purpose of discovery would seem in many cases to have been lost sight of and even expressly questioned: *Hills v. Wates*, L. R. 9 C. P. p. 689 (whether a party could be asked to swear to the truth of his plea): *Bayley v. Griffiths*, 1 H. & C. p. 433 (whether a party could search his adversary's conscience as to his own case): and see *Edwards v. Wakefield* and other cases *post*, under (b).

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(b) See *ante*, p. 448.

1. *Generally as to the Common Law Practice in respect of this Office of Discovery.*

Generally the doctrine of the common law courts was that interrogatories relating exclusively to the adversary's case: see *post*, p. 465: and see *ante*, p. 13): or for the purpose of disclosing it: see *Zarifi v. Thornton*, cited *post*, p. 462: were inadmissible; but in some cases the office of interrogatories was not so narrowed: see *Goodman v. Holroyd* and other cases *post*: and *Towne v. Cocks*, *post*, p. 458.

In *Edwards v. Wakefield*, 6 E. & B. 462, it was said that section 51 of the C. L. P. Act was not intended to give a party the power of asking his adversary how he intended to shape his case (see *ante*, p. 447, as to this expression): so Cockburn, C. J. in *Moor v. Roberts*, 2 C. B. N. S. 671, at p. 679:

but the object of the discovery is not, as there put, to see whether there are any defects of which the party may avail himself (see as to this point *post*, p. 459), but to know what the case is, or to sift the adversary's conscience as to it: However, at p. 680, Cresswell, J. regards it as inadmissible for either object: And on the same page Williams, J. considered that the interrogatories (see as to the facts of this case, *post*, p. 462) were objectionable as attempting to obtain a knowledge of what the plaintiff intended to rely on in support of his case (as to which see *ante*, p. 446, referring to *Millington v. Loring*): see also *Hunt v. Hewitt*, 7 Exch. p. 244, where discovery of the manner in which the adversary's case was to be established was said to be inadmissible in equity: but see *ante*, p. 447, citing *Redes*. Pl. 9.

In *Edwards v. Wakefield*, being an action of trover by a bankrupt's assignees for some of his property, the defendant was not allowed to ask the plaintiffs on what acts of bankruptcy they intended to rely and generally what case they intended to set up, Lord Campbell, p. 468, also considering that it was an attempt to obtain particulars on oath and therefore inadmissible: (but see as to the present practice *post*, p. 452). This case was cited and approved by Bacon, V. C. in *Saunders v. Jones*, 7 Ch. D. p. 445. It may however be noted that in *Carleton v. Leighton*, 3 Mer. 667, approved in *Hardman v. Ellames*, 2 M. & K. p. 740, the defendant pleading the plaintiff's bankruptcy was held bound to set out the facts on which the bankruptcy rested.

The decision in *Flitcroft v. Fletcher*, 11 Exch. 543, by which a defendant in ejectment was allowed to interrogate the plaintiff as to his title or pedigree (see *post*, p. 534), was expressly confined to cases of that character: see *Edwards v. Wakefield*, p. 469; and was not extended generally so as to entitle a defendant in an action of trover to interrogate the plaintiff as to his title to the goods: see *Finney v. Forwood*, L. R. 1 Ex. p. 8, cited *post*, p. 462: but see as to discovery of a party's title *post*, Pt. III. Sects. I. (c) and II.

In other common law cases this office of discovery was recognized as legitimate: see *Goodman v. Holroyd*, cited *post*, p. 462: *Hawkins v. Carr* and *Hills v. Wates*, *post*, p. 457: and *Bayley v. Griffiths*, *post*, p. 461. In this last case Pollock, C. B. citing Lord Abinger's opinion to the effect that though in general the defendant has no right to discovery of the plaintiff's title yet in certain cases he will be entitled to a discovery of the nature though not of the evidence of his title (as to which see *post*, p. 533), suggested, in illustration of the proposition that the plaintiff had a right to know what facts the defendant intended to prove in order to meet them, that where a set-off was pleaded a party was entitled to know what were the items and dates (and see *post*, p. 455), or where a release was pleaded to inspect the release: see pp. 434—435.

## 2. (See *ante*, p. 450) *Particulars and Discovery in the nature of Particulars.*

See also the cases cited *post* (4).

Some doubt was originally felt as to whether it was admissible to use interrogatories for this purpose. It was said that if a party were compelled to answer interrogatories requiring him to specify such acts as were relied upon in support of his case he would be precluded from afterwards adducing further acts in evidence at the trial: and reference was made to the old common law practice of particulars in support of this

contention. But it was held an application might be made to amend or supplement the answers if any subsequent facts were discovered, just in the same way as particulars could be amended: *Gay v. Labouchere*, 4 Q. B. D. p. 207: *Saunders v. Jones*, 7 Ch. D. p. 452. Again stress was laid upon the fact that answers to interrogatories were made upon oath whereas particulars were not. But a party is not asked to swear that such and such acts have been committed, but that he relies on such and such acts in support of his case: *Saunders v. Jones*, p. 452. Interrogatories were used to obtain particulars in chancery: *Saunders v. Jones*, p. 449; and even at common law such a practice appears to have been gradually growing up: *ibid.* p. 451. At all events under the practice since the Jud. Act it is admissible to use interrogatories for this purpose (see also *Augustinus v. Nerincke*, 16 Ch. D. 13), and where interrogatories are being administered such a practice saves expense: *Benbow v. Low*, 16 Ch. D. p. 97. See however under the new rules, *ante*, p. 91, as to leave to interrogate where particulars would be sufficient for the purpose.

*Saunders v. Jones* was an action for (among other things) damages for wrongful dismissal of the plaintiff from his employment by the defendant. The defendant in his statement of defence and counter-claim referred, as justifying the dismissal, generally to instances of misconduct, improper receipt of commissions, contracts involving losses, &c. The plaintiff interrogated as to particulars of these various alleged wrongful acts; the defendant in his answer objected, except in one or two matters of detail, to give the information mainly on the ground that it related to the case made by him against the plaintiff and did not advance the plaintiff's case (a form of objection, however, which is mainly applicable only to cases where inspection of the adversary's evidences is sought, see *post*, pp. 466, 481). The following passages from the judgments sufficiently show the grounds of the decision. "At common law if a master says to his servant 'I dismissed you because you were guilty of misconduct' the servant would be entitled to have particulars. The plaintiff requires the information in order that he may not be taken by surprise but may know what he has to meet:" James, L. J. p. 448. "This action is in substance the old common law action for wrongful dismissal. The first four interrogatories, practically amount only to asking the defendant to give a list of the acts on which he relies as justifying the dismissal. The case of *Commissioners of Sewers &c. v. Glasse*, L. R. 15 Eq. 302 (see this case cited *post*, p. 466) is clearly distinguishable. There the plaintiff had set up a particular right. Part of his evidence would be to show that the right had been actually enjoyed: and the defendant asked to be allowed to interrogate him as to specific instances in which the right had been exercised or enjoyed. Lord Romilly decided that that could not be done for this obvious reason: the acts themselves were not at issue but were only evidence bearing on the issues. But in this case where the defendant has pleaded in most general terms acts of misconduct he might set up any particular act of misconduct as one of the issues in the action.



If that be so, the plaintiff is entitled to know what that specific issue is, and the interrogatories to which I refer amount to no more than asking the defendant to give such particulars as will enable the plaintiff to see what are the issues with which he has to deal:" Thesiger, L. J. pp. 451—452. (See *ante*, p. 29, as to the account here ordered.) In *Marquis of Bute v. Lewis*, 15 W. R. 479, the plaintiff alleged that until a particular year no acts of ownership had been exercised by the defendants over certain property and that they had never acquired any right or title to the soil (it being practically admitted that they had no title by conveyance but only by long possession, and the plaintiff having framed his case accordingly): the defendants answered that they had exercised, as they believed from time immemorial, all acts of ownership usually exercised by owners of land, specifying some particular acts. The answer was held insufficient, they must answer as to the times of the acts of ownership, but they need not set out every act exercised, and they must say how or when they acquired title to the soil. See as to discovery of the nature of a party's title, *post*, Pt. III. Sect. I. (c) and II.

*Saunders v. Jones* must not be understood as in any manner relaxing the old established proposition that a party is not entitled to see his adversary's brief. It decides nothing more than that what is or was obtainable upon an application for particulars may also be obtained by administering interrogatories: see Jessel, M. R. in *Benbow v. Low*, 16 Ch. D. pp. 97—98, the party is not allowed to see the brief beyond that: but only to know the substantial particulars on which the other side is going to rely: see James, L. J. *ibid.* p. 99.

If a man says "I am entitled to recover an estate because you have committed breaches of covenant" the other party is entitled to ask "Tell me what breach of covenant I have committed:" James, L. J. in *Benbow v. Low*, p. 99. Accordingly in this case of *Benbow v. Low*, 16 Ch. D. 93, an action for infringement of a trade mark, the defendants were held not entitled to ask for quantities of goods sold by the plaintiff with the trade mark on them, for such discovery would not support any case raised by them in answer to the plaintiff's case, nor was it required in order to show the nature and character of the acts and things relied on by the plaintiff, but it was a desire to know what evidence would be given by the plaintiffs in support of their statements and of the acts which they alleged made out their case: see Cotton, L. J. p. 99: and Jessel, M. R. p. 96.

So interrogatories by defendants were allowed inquiring how a firm, which the plaintiff in his claim alleged to be collectively liable to him for a certain sum, was so liable, how when and where the execution of a certain deed, alleged to have been communicated shortly after the execution, was so communicated, and what were the accounts alleged to purport to be a partial account of the defendants with their trust property: *John v. James*, 13 Ch. D. 370.

So where in an action for dissolution of partnership the plaintiff alleged that the defendant had . . . since from about the month of January 1878 so behaved . . . himself towards the plaintiff in the presence . . . of many of the patients, and on other occasions . . . , and such behaviour . . . had in fact lowered the plaintiff in the estimation . . . of the patients, the dates and particulars of these occasions had to be given, but not the names of the patients (as being witnesses see *post*, p. 471): *Lyon v. Tweddell*, 13 Ch. D. 375.

Where a plaintiff alleged that he was induced to take shares in a worthless mine, by false statements in divers papers and circulars, mentioning only

one paper, he was ordered by the Court of Appeal, reversing *Malins*, V. C. 37 L. T. 522 (who considered that the interrogatories inquired into the plaintiff's evidence), to answer in effect what were the papers and statements, and whether he read them before he bought the shares, for these were the material facts on which the subsidiary issues would be raised and merely amounted to better particulars: *Ashley v. Taylor*, 38 L. T. 44.

The following notes as to the practice in respect of particulars may be useful:—

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid (forms of pleading in App. C. D. and E. to the rules) particulars, with dates and items if necessary, shall be stated in the pleading: provided that if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading: Ord. XIX. r. 6. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just: Ord. XIX. r. 7. See as to stay of proceedings under rule 8, *post*, Bk. III. Ch. VII. Sect. I.

In giving particulars of undue influence in a probate suit the old practice will be followed, and only the names of the persons charged with having exercised undue influence need be given: *Salisbury v. Greville-Nugent*, 50 L. T. 160.

In an action on a life policy, the defendants pleading that the assured had symptoms of a certain disease were ordered to give particulars of the symptoms: *Marshall v. Emperor Life Assurance Society*, L. R. 1 Q. B. 35.

In an action founded on fraudulent representations by the defendant the plaintiff was ordered to amend his claim by stating therein, pursuant to Ord. XIX. r. 6, particulars of the representations therein alleged, and whether they were oral or in writing and when and where made: *Seligmann v. Young*, W. N. 84, p. 93.

In an action for slander of title, to the effect that the defendant wrote that the plaintiff's machines were an infringement of his patent, particulars of the infringement by reference to the specification were ordered, for the defendant was in the same position as if he had brought an action for infringement (see *post*, Bk. III. Ch. I.): *Wren v. Weild*, L. R. 4 Q. B. 213.

See as to particulars from a plaintiff in an action for slander, *post*, p. 473.

By Ord. XXXVI. r. 37, in actions for libel or slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.

In actions of libel particulars are ordered of the matters on which a defendant relies in support of a general plea of justification: *Gourley v. Plimsoll*, L. R. 8 C. P. 362: *Jones v. Bewicke*, L. R. 5 C. P. 32: *Stainbank v. Beckett*, W. N. 79, p. 202: and see *post*, p. 463.

In an action for seduction the plaintiff is not compelled to give particulars of the times and places, unless the defendant denies the seduction: *Thomson v. Birkley*, 47 L. T. 700.

In an action for calls, the defendants must give particulars of the acts of fraud in a plea of fraud: *M'Creight v. Stevens*, 1 H. & C. 454.

See *Whyte v. Ahrens*, *ante*, p. 36, as to particulars of fraud.

A plaintiff must give particulars of items for which he gives the defendant credit: *Godden v. Corsten*, 5 C. P. D. 17.

455. To follow "*N. P. Neilson*."

Where plaintiff alleged that by negligent and unskilful navigation the ship ran on a rock, the plaintiff was held not bound to answer what was the negligence and unskilfulness on which he relied, for he could only get the particulars from the defendants' servants, and sufficient was stated for them to know what case they had to meet, distinguishing *The Rory*, cited p. 455, and *Saunders v. Jones*, cited p. 452: *Scaramanga v. Martin*, 29 S. J. 9.

Where a specific sum is claimed and not a general account, particulars of the sum must be given: *Blackie v. Osmaston*, 28 Ch. D. 119: 33 W. R. 158: 52 L. T. 6: *Augustinus v. Nerinck*, 16 Ch. D. 13. Particulars of an alleged breach of trust were ordered in *Austice v. Hibbell*, 33 W. R. 557: 52 L. T. 572.

... (accident), and other cases cited *ante*, pp. 141—142: where it was held that discovery of this nature in the shape of the information of the party's agents or servants who were present, the party himself not being present, must be given: (not his witnesses' accounts: see *Anderson v. Bank of British Columbia*, 2 Ch. D. p. 658: but that his agent will be his witness is no protection against discovering the agent's information, see *ante*, p. 364): and see also, *post*, as to conversations. No doubt in *Peppiatt v. Smith* (cited *post*, p. 469), interrogatories were disallowed on the ground, see p. 132, that they required the plaintiffs to give their version of the transaction (an accident). But qu. whether this decision can stand with the other cases also cited, *post*, pp. 469—470: and see *Jones v. London Road Car Co.* *ante*, p. 93.

See an exceptional case of *Grumbrecht v. Parry* (loss of ship), cited *post*, p. 459, and distinguished from *Bolckow v.*

*Fisher, ante* : the interrogatories being held inadmissible as being founded on a hypothetical state of facts: see also a particular interrogatory in *The Radnorshire* referred to *post*, p. 460.

It may be noted that in admiralty actions of collision each party is bound to give by his preliminary case his own or the captain's history of the collision: see *post*, Bk. III. Ch. III. Sect. III. as to this, and generally as to discovery in admiralty causes.

Where a parol consent and authority (by a deceased person, see *post*, referring to *Eade v. Jacobs*, *Hawkins v. Carr*, &c. but the decision was not based on this) was set up as a defence the substance, not the details, of the conversation on which the defendant relied must, it was held, be given by way of discovery: *Eade v. Jacobs*, 3 Ex. D. p. 337: *A. G. v. Gaskill*, 20 Ch. D. pp. 529, 531.

Where both parties consider a conversation material and there is a dispute as to what passed at it, it seems that the plaintiff has a right to get from the defendant his version to the best of his recollection of the conversation: it may be useful as an admission, and so save the trouble of calling witnesses to state what passed: the defendant has no right to wait to give his version until he has seen what the witnesses (here the plaintiff's solicitor) present on the other side: see *A. G. v. Gaskill*, pp. 527, 529: (and see as to this last point, *ante*, p. 133).

Conversations between the plaintiff and defendant's agent were ordered to be given by the plaintiff in answer to interrogatories in a common law case of *Rew v. Hutchins*, 10 C. B. N. S. p. 837.

Thesiger, L. J. in *Fisher v. Owen*, 8 Ch. D. p. 657, considered that interrogatories inquiring into conversations were as a rule objectionable, though in the particular case he held an interrogatory calling for a general statement of a conversation justifiable, it having passed between a deceased person (see *post* (4), referring to *Eade v. Jacobs*, *Hawkins v. Carr*, &c.) and the interrogated party and a person charged to be a party to the conspiracy, and no other person being present.

The occasion of the conversation relied on must be given: *John v. James*, 13 Ch. D. p. 374: *Lyon v. Tweddell*, *ibid.* p. 375.

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#### 4. *Further Illustrations of this (see ante, p. 448) Purpose of Discovery.*

See also *post*, Bk. III. Chap. I. as to patent actions: and *post*, p. 473, as to interrogatories inquiring into the contents of the adversary's documents.

Where a defendant set up an agreement by way of counter-claim he was held bound to answer when where and how it was entered into and the particulars of it: *Burrett v. Burrett*, W. N. 80, p. 193: see as to production of an agreement the subject of an action, *ante*, p. 257.

In *Ingleesi v. Spartali*, 29 Beav. 564, the defendants, being asked by what documents they were invested with certain authorities claimed by them, were held bound to specify the particular letters on which they relied and not merely to refer to certain correspondence generally.

Where in a copyright suit a defendant alleged that certain information which the plaintiff asserted had been taken from his own book was obtained from original sources he was ordered to say what those sources were: *Kelly v. Wyman*, 17 W. R. 399.

In an action for specific performance of an agreement to purchase what was alleged to be a secret process, the defendant, saying that it was no secret, that other persons had used it and that the plaintiff had himself disclosed it to other persons, was ordered to discover the names and addresses of these persons, for the plaintiff was entitled to know the particular charges he had to meet: *Kuhliger v. Bailey*, W. N. 81, p. 165: and see *post*, p. 551, as to patent actions where similar discovery is ordered.

In *Eade v. Jacobs*, 3 Ex. D. 335, the administrators of an intestate sued for breach of covenant and the defendant alleged that the intestate had verbally consented to the breach. The defendant was compelled to answer when the consent was given and what was the substance of the conversation (see *ante*, p. 456, as to conversations) which took place.

In two cases of *Hawkins v. Carr* and *Parsons v. Carr*, L. R. 1 Q. B. 89, followed in *Hills v. Wates*, L. R. 9 C. P. 688, the common law judges allowed discovery beyond what they considered was consistent with the common law practice on the ground that the matters as to which discovery was sought having been transacted with a person then deceased lay solely within the knowledge of the person interrogated: (see as to this *ante*, pp. 299—300). In *Hawkins v. Carr* the action was brought by surviving partners of a firm for the price of goods bought by the defendant: the defendant pleaded a settlement of the account with the deceased partner. *Parsons v. Carr* was an action brought in respect of the same subject-matter by the executors of the deceased partner. In each case the defendant was compelled to answer interrogatories inquiring into the alleged settlement. *Hill v. Wates* was an action brought by the executors on a promissory note given to the testator; and the defendant pleading payment to the testator was compelled to answer interrogatories inquiring into the circumstances of the payment. Cotton, L. J. in *Eade v. Jacobs*, 3 Ex. D. p. 337, considers that it may sometimes happen that an executor or administrator may properly interrogate as to circumstances which lay within the knowledge of the deceased person whom he represents: see further, *ante*, p. 456.

Where the plaintiff charged that certain securities were given for money lent at play and inquired what consideration the defendant gave for them it was held insufficient to say "for money lent:" *Sloman v. Kelly*, 3 Y. & C. 673.

In a common law action for money had and received to recover a moiety of the rent of a churchyard and of the tithe rentcharge brought by a rector against his patron, the defendant set up a claim by prescription and as to the tithe rentcharge under an old agreement under the Tithe Commutation Act between a predecessor of the plaintiff himself and other landowners by which, as he alleged, it was directed to be paid in equal shares to the plaintiff's predecessor and himself. The plaintiff was allowed to put interrogatories inquiring into the character of the defendant's title and the quality of his possession, but not (see *ante*, p. 447, as to this expression) to disclose the manner in which he intended to establish it. He was therefore protected from saying by what authority he had received the tithes and rentcharges; but he was ordered to answer how long he and his predecessors had been in possession of the rent and rentcharge and other circumstances relating thereto, and to give the names of such predecessors in title: *Towne v. Cocks*, L. R. 9 Ex. 5. See generally as to discovery of the nature of a party's title in actions for the recovery of land, *post*, Pt. III. Sect. I. (c) and II.: and see *Commissioners of Sewers v. Glassey* and *Bute v. Lewis*, cited *ante*, p. 452.

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As regards discovery of this kind (see *ante* (a) and (b), at p. 448), there seems to be no distinction (see as to any such distinction with respect to discovery of the nature of the adversary's title in actions for the recovery of land and in particular as to a plaintiff's obligation in this respect in certain actions (*post*, pp. 516, 525, 529, 531) between the position of plaintiff and defendant. There is no such doctrine for instance as that a plaintiff attacking some other person must disclose everything on which he relies for the purpose of his attack: see Lord Selborne in *Minet v. Morgan*, L. R. 8 Ch. p. 364: and *post*, p. 530, referring to Wigr. But see *ante*, pp. 243, 245, in reference to the greater obligation to produce documents referred to in his pleadings imposed on him by Ord. XXXI. r. 15. See also *post*, pp. 467—468.

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#### B. *Discovery tending to impeach or weaken the Adversary's Case.*

The other of the two legitimate purposes of discovery referred to *ante*, p. 446, as being propositions between which and the rule negating the right to discovery of the adver-

sary's evidence the dividing line is in many cases very difficult to draw, may be thus stated in Lord Cottenham's language in *A. G. v. Corp. London*, 2 M. & G. : a party is entitled to discovery not only of that which constitutes his own title but to repel the defence which he expects will be set against him, p. 257, of everything which may enable him to defeat the title expected to be set up against him, p. 260; to rebut the adversary's evidence in support of his case : see *Glascott v. Copper Miners Co.* 11 Sim. p. 312.

This discovery is directed not to the adversary's case but to the purpose of attack upon or impeaching his case : see Wigr. Pl. 343 : and see *post*, pp. 464, 465. Interrogatories are admissible which advance the party's own case by damaging that of his opponent : see *Hall v. Liardet*, W. N. 83, p. 176, cited *post*, p. 467 : see also as to production of documents for this purpose, *post*, pp. 494—499. A plaintiff (see as to any distinction between plaintiff and defendant, *post*, p. 467) may not only interrogate in support of his own case but also for the purpose of destroying the defendant's case : Brett, M. R. in *Grumbrecht v. Parry*, 32 W. R. 558, affirming the court below, 32 W. R. 203 : 49 L. T. 570, on one ground, see *post*, but expressly disapproving another of the grounds of that decision, namely that discovery directed

#### 458. *Under heading B.*

See further, as to discovery impeaching or destroying the adversary's case, and in particular where the party sets up no substantive case of his own but merely traverses that of the adversary, *ante*, p. 446, discussing *Bidder v. Bridges*, and *post*, pp. 464, 465.

pleadings, and which for anything that appears may be wholly imaginary : following out in fact the practice under the C. L. P. Act : see *post*, p. 461 : and see *post*, p. 464, in connection with the equity practice.

The action was to recover damages for non-delivery of goods shipped on the defendant's ship ; the plaintiff alleged that the ship was not seaworthy at the time she sailed : the defendant pleaded the excepted perils. The plaintiff interrogated for the purpose of rebutting this defence, and the inter-



rogatories were framed on the assumption that the loss occurred through some valve or pipe having been left open, no suggestion of this kind however being made in the pleadings. The interrogatories were struck out (see *ante*, p. 107) under r. 7 of Ord. XXXI.; per Huddleston, B. on the ground that the object was to anticipate the defendant's case or to meet the case which the plaintiff anticipated would be set up, and were therefore inadmissible (but on this point reversed see *ante*), and with difficulty distinguishing *Bolckow v. Fisher*, 10 Q. B. D. 161\*: per Grove, J. on the ground that the interrogatories did not ask whether certain things happened or were done which might be expected in the ordinary course of navigation as in *Bolckow v. Fisher* (where, the defence being that the ship was stranded in a fog, the plaintiff interrogated as to when Portland was sighted, what course was being steered, and as to taking soundings and other matters; see further, *ante*, pp. 139—140), but were based on a mere hypothetical state of facts; and, in answer to the argument that the defendant had only to deny the facts if they were untrue, that in this case the defendant would be compelled to make inquiries of his agents and servants, and that it was unreasonable to put him to this expense for the purpose of answering interrogatories of such a character. The decision was affirmed on appeal on the ground that the interrogatories were prolix, see *ante*, p. 107.

The following interrogatory was struck out (under the old rule, but *qu.* see *ante*, p. 105) as too vague:

"Is there any act command fact matter or thing not disclosed in your answers to the above interrogatories which it is material to the defendants to know for the purpose of defeating your claim in this action, or for the purpose of rendering you liable for all or some of the damage resulting from the collision mentioned in the statement of claim? If yea, set it forth. State when it happened and who can depose to the same. The action was an action of damage for collision of ships": *The Radnorshire*, 5 P. D. 172.

### 1. *The Common Law Practice.*

In this respect again (see *ante*, p. 450) the measure of discovery allowed by the common law courts under the C. L. P. Act seems to have fallen somewhat short of that which was allowed in equity.

The party's right of discovery was rigidly confined (see the reasons *ante*, p. 111†) to such as was required in support

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\* In *Bolckow v. Fisher* (see *ante*, p. 139) no objection had been made to the matter of the interrogatories except that they involved the obligation of applying to agents servants &c. for information: and the objection was overruled.

† Generally it may be noted that under sect. 51 of the C. L. P. Act, 1854, they did not consider themselves bound by the practice in equity: see *Hill v. Campbell*, L. R. 10 C. P. pp. 234—235, 244, referring to *Osborn v. London Dock Co.* 10 Exch. p. 702: and *Bartlett v. Lewis*, 12 C. B. N. S. pp. 261, 262: though see *Hawkins v. Carr*, L. R. 1 Q. B. p. 93: *Edwards v. Wakefield*, 6 E. & B. 462, p. 467: *Whateley v. Crowter*, 5 E. & B. p. 712: *Martin v. Hemming*, 10 Exch. 478. In *Jourdain v. Palmer*, L. R. 1 Ex. p. 106, Channell, B. considered that the equity rules were generally taken by the common law judges as a guide in determining whether interrogatories should be allowed.

of or was relevant to a definite case set up or intended to be (a mere suggestion that it might be material to a particular line of defence was not sufficient unless an intention was shown of adopting it: see *Alexandra Dock Co. v. Elliott*, 23 L. T. p. 848) set up by him: anything beyond this being considered to be an attempt to fish out a case, or on the chance of getting hold of facts to help his case, or to see how the adversary was going to shape his case (see *ante*, p. 447, as to this expression), or what facts he would be able to prove: see *Jourdain v. Palmer*, L. R. 1 Ex. p. 105: *Moor v. Roberts*, 2 C. B. N. S. pp. 679—680: *Atter v. Willison*, 7 W. R. 265: *Alexandra Dock Co. v. Elliott*, p. 848: *Edwards v. Wakefield*, 6 E. & B. pp. 468—469: Lush Pr. 855—856: *Derby, &c. Bank v. Lumsden*, L. R. 5 C. P. 107: *Finney v. Forwood*, L. R. 1 Ex. 6. See also *Grumbrecht v. Parry*, cited *ante*, p. 459 (since the Jud. Act).

Discovery therefore for the purpose of negating or rebutting the adversary's case was frequently regarded (and see *Grumbrecht v. Parry*, *ante*, p. 459) as an attempt to inquire into the adversary's case unless some specific foundation was laid. It may however be noted that in *Goodman v. Holroyd* (cited *post*), p. 844, Williams, J. said, "It is no violation of the rule which excludes a party from prying into the evidence by which his adversary's case is to be supported to hold that a defendant may be interrogated in order to show that his defence is nought," citing the language of Lord Cottenham in *A. G. v. Corp. of London*, referred to *ante*, p. 459.

Where a distinct case of fraud (and see *Whyte v. Ahrens*, *ante*, p. 36) was alleged discovery of this nature would be allowed; but a mere suggestion of fraud was not enough unless some foundation for the charge were laid: see *Derby, &c. Bank v. Lumsden* (cited *post*, p. 462), p. 111. The following cases illustrate the point:—

In *Bayley v. Griffiths*, 1 H. & C. 429 (and see *ante*, p. 451), an action on a promissory note, the plaintiff, having alleged in his reply that a deed of arrangement made by the defendant with his creditors which was set up as a defence was procured by fraud and the debts fictitious, was allowed to

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In Day C. L. P. p. 307, it is said that the courts were guided by the principles on which a court of equity allowed discovery but with the necessary modifications required by the difference of subject-matter.

interrogate as to facts connected with the execution of the deed, the creditors' meetings, and their debts names &c. So in *Goodman v. Holroyd*, cited *ante*, p. 451, a similar case. See also *Bartlett v. Lewis*, cited *ante*, p. 320 (interrogatories to show that a bankrupt's certificate was void): and see *post*, p. 463, referring to these cases.

In *Zarifi v. Thornton*, 26 L. J. Ex. 214, an action on a policy of insurance on cargo, the defendants, pleading denial of the policy and the plaintiffs' interest, were not allowed (as disclosing the plaintiffs' case, see *ante*, p. 450) to ask as to the execution of the policy or the purchase of the cargo, but upon an affidavit suggesting that a portion of the cargo had been recovered by the plaintiffs they were allowed to interrogate thereto.

If the defence to be founded on a plea of non est factum is that the deed was to operate as an escrow, it would be open to the defendant to ask questions about the delivery of the deed: so if the defence was that the signature was improperly obtained, to inquire about the circumstances of signing: *Alexandra Dock Co. v. Elliott*, p. 847: and in this case interrogatories by the defendant were disallowed which inquired as to various circumstances connected with the signatures of directors to the contract sued upon, no special defence to which they might relate having been set up, following *Bechervaise v. G. W. R. Co.* L. R. 6 C. P. 36. See however *Glascott v. Copper Miners Co.* 11 Sim. 305, a bill of discovery in aid of the defence to an action on a contract, where the plaintiffs in the action were ordered to answer whether or not they were the vendors and whether or not the contract was fictitious, the bill however containing an allegation to that effect.

In *Mary or Alexandra*, L. R. 2 A. & E. 319, where the equity practice of discovery was expressly adopted, interrogatories were allowed to be administered by the plaintiffs, the United States Government, inquiring into the title by which the present owners had acquired the ship, whether certain documents and transfers set up were not colourable, and whether the true owners were not the rebel government, the interrogatories having, see p. 323, a bonâ fide tendency not merely to negative and destroy the defendants' title but to affirm and render evident that of the plaintiffs (see as to this point *post*, p. 497).

In an action of trover for barley by indorsees of the bill of lading from the consignees against the shipowners who had delivered the barley to the consignees without requiring the production of the bill of lading, the defendants, on a special affidavit in which they suggested that the bill of lading was indorsed to the plaintiffs after delivery of the barley or that the plaintiffs having the bill in their possession knowingly allowed the shipowners to deliver the barley, were allowed to administer interrogatories, a foundation having been thus laid for them, for the purpose of ascertaining these facts in order to support their attempt to displace the plaintiffs' primâ facie title: *Derby Commercial Bank v. Lumsden*, L. R. 5 C. P. 107.

In another action of trover for cotton (*Finney v. Forwood*, L. R. 1 Ex. 6) interrogatories by the defendant asking the plaintiff how and when he first became possessed of the cotton and as to his dealings with the person who had sold it to the defendant were disallowed, as to the last on the ground that no allegations as to any such dealings had been made as a basis for them, and as to the others that they were interrogatories inquiring into the plaintiff's title and therefore (see *ante*, p. 451) improper.

Other cases where interrogatories were allowed or disallowed according as it was considered that they were put to support a definite case set up or to fish out a case by finding flaws in the opponent's case:—

*Moor v. Roberts*, 2 C. B. N. S. 671 (and see *ante*, p. 451), action by mortgagee to recover deficiency on sale; interrogatories by defendant as to manner of conducting the sale disallowed, no specific defence being raised: *Morris v. Bethell*, L. R. 4 C. P. 765, action by indorsee of bill of exchange

against the acceptor, his defence being that it was not his acceptance, interrogatories by the plaintiff disallowed which asked whether another bill similarly accepted had not been paid by the defendant, for there being no allegation that the defendant had given a general authority to accept bills in that form, the interrogatories were irrelevant. In *Rew v. Hutchins*, 10 C. B. N. S. 829, an action for commission on a contract, the defendant was allowed to interrogate the plaintiff as to facts and communications connected with the contract but not for the purpose of disproving the general custom of the trade on which it was believed (see *ante*, p. 459) the plaintiff intended to rely: (see as to this last point *Girdlestone v. N. B. Insurance Co.* referred to *post*, p. 467). In *Zychlinski v. Maltby*, 10 C. B. N. S. 838, an action for malicious prosecution on a charge of obtaining money on false pretences, the defendant was allowed (subject to any objection on criminatory grounds, see *ante*, p. 320) to interrogate as to certain matters on which he intended to rely as showing reasonable cause for the prosecution. The decision in the two last cases and in *Bartlett v. Lewis*, and *Bayley v. Griffiths*, *ante*, p. 461, were supported in *Stern v. Sevastopolo*, 14 C. B. N. S. pp. 740, 741, cited *post*, on the ground that the interrogatories were directed to ascertain definite facts material to the applicant's case although the effect might be (see as to this *post*, p. 465) to disclose the adversary's case. In *Stewart v. Smith*, L. R. 2 C. P. 293, an action for malicious prosecution on a charge of stealing books interrogatories by the defendant were allowed, following *Zychlinski v. Maltby*, requiring the plaintiff to state whether the books were not in his possession and when and how he got them.

**Actions for Libel.**—See as to discovery from defendants in action for libel, *ante*, pp. 319, 347—348, in connection with the subject of criminatory discovery. As to the right of a defendant to interrogate the plaintiff the court seems to have considered (see as to the old equity practice in this particular respect, *ante*, p. 348) that a defendant pleading justification ought primarily at all events to be able to justify the libel by his own means and should not be allowed to fish out a defence by discovery. In *Gourley v. Plimsoll*, L. R. 8 C. P. 362 (see also this case, *ante*, p. 99, in connection with discovery prior to giving particulars), an action for libel based on charges of overloading &c. . . . ships, the court refused the defendant leave to administer interrogatories before he had complied or at all events attempted to comply with an order for particulars intended to be relied on under his pleas of justification, on the ground that it was an attempt to fish out a defence (p. 375) and not for the purpose of supporting a defence already put forward. See also *Metropolitan, &c. Co. v. Hawkins*, cited *post*, p. 513. In *Buchanan v. Taylor*, W. N. 76, p. 73, the defendant pleading justification was allowed to ask whether the plaintiff wrote the particular articles on which he sought to justify, but not what articles, only the particular circumstances.

**Actions for Slander.**—The plaintiff would only be allowed to interrogate as to the words used on the occasions in question under special circumstances, as where it was shown by affidavit that a slanderous imputation of a definite character had been made by the defendant against the plaintiff, and he had no means of ascertaining the exact terms of the slander except by interrogatories, the only persons able to give the information refusing to give it: *Atkinson v. Fosbrooke*, L. R. 1 Q. B. 628, pp. 630, 631. In *Stern v. Sevastopolo*, 12 C. B. N. S. 249, the plaintiff interrogated to the following effect:—"Did you speak or publish the words set out in the declaration, or any and which, or any and what other words conveying the same or similar imputations? When, where and to whom did you speak and publish them?" They were disallowed as vague and fishing. And in *Atkinson v. Fosbrooke* the different circumstances of the two cases were pointed out. In *Colonial Assurance Co. v. Prosser*, W. N. 76, p. 55, where the defendant admitted the conversation but denied that he used the slanderous words, and said that what he said was true, particulars were refused as immaterial. See as to the names of the persons in whose presence the slanders were uttered, *post*, p. 473, referring to *Bradbury v. Cooper*.

## 2. *The Equity Practice.*

This distinction, which was observed in the common law courts (see *ante* (1), and see *ante*, p. 459, referring to *Grumbrecht v. Parry*, since the Jud. Act) between interrogatories pointed to some particular case raised or intended to be raised and interrogatories not so pointed, was recognized in equity, although, for reasons to which reference will immediately be made, the difficulty did not so often arise in practice. Where a party makes a specific case of his own and asks discovery in opposition to the defence, but which is addressed to the proof of a case specifically made in the bill, it is clearly distinguishable in principle as well as in fact from a direct inquiry into the evidence of his opponent's case: Wigr. Pl. 114. Where a plaintiff makes a case in his bill which would disprove the truth of or otherwise invalidate the defence, he may be entitled to discovery from the defendant, in order to enable him so to impeach the defendant's case: Wigr. Pl. 342. See also observations of Lord Hatherley in *Borill v. Goodier*, referred to *post*, p. 553, and other patent actions there cited.

The point arose in equity more often in connection with the production of documents (as to which see *post*, p. 500) than with interrogatories. As regards the plaintiff's interrogatories, each of them was, as a rule, founded upon a specific allegation in the bill (see *ante*, p. 111), and they were delivered before the defence in the form of the plea or the answer was put in. A plaintiff could hardly in the nature of things interrogate for the purpose of disproving some matter alleged in the defence unless it had been anticipated by the bill. Where a pure affirmative plea was put in, that is of something not anticipated or mentioned in the bill, the plaintiff was not entitled to any discovery at all, for his case as stated in the bill was admitted, see *ante*, p. 15, n. As regards a defendant's interrogatories, although they were administered after the plaintiff's case was put forward and when therefore the disproof of the plaintiff's case was a part of the defendant's case, yet they must have been founded in the same way upon a cross bill or concise statement: their relevancy being determined by reference to the statements in the bill and the defendant's answer thereto.

Certainly, whether for the reason above stated or whether to some extent perhaps from the different nature of the actions, the point did not arise in equity with the same frequency as it arose at common law under the C. L. P. Act and as it does arise under the present practice (see also *ante*, p. 112 and *ante*, p. 459) that is to say how far a party who has traversed a particular part of his adversary's case without making any specific counter allegation but thereby clearly makes it a matter in question in the action may interrogate to support

his traverse. That he is entitled to some discovery is clear, but it should seem of a less searching character than where particular allegations are made: see further *Grumbrecht v. Parry*, cited *ante*, p. 459: see also *Metcalfe v. Harvey*, *Bellwood v. Wetherell*, and other cases cited *post*, pp. 531—533.

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3. *Interrogatories the Answers to which may or may not support the Case of the Interrogating Party, or may or may not disclose the Opponent's own Case, or which while disclosing it will also disclose Matter material to the Case of the Interrogating Party.*

It was held in the common law courts that an interrogatory must be answered if the answer might be reasonably expected to discover matter which would advance or be material to the case of the interrogating party though the answer might also disclose that of the adversary; that it was only where it inquired into what was exclusively the adversary's case: *Whateley v. Crowder* (cited *post*), 5 E. & B. pp. 712—713: *Stern v. Sevastopolo*, 14 C. B. N. S. p. 741: and see *Zarifi v. Thornton*, 26 L. J. Ex. p. 215: and *ante*, p. 450: or where it related wholly to matter which tended to support the adversary's case: *Stewart v. Smith*, L. R. 2 C. P. p. 296; that it should be disallowed (but it is no objection to an interrogatory that it inquires into matter relating exclusively to the adversary's case, see *ante*, pp. 13, 444, 446). Where interrogatories related as much to one case as the other they should be allowed: *Bayley v. Griffiths* (cited *ante*, p. 461), 1 H. & C. 423. And so in equity: see Wigr. pl. 344: and the cases *post*. This is in accordance with the proposition that a party is not bound to give discovery of the evidence of his case: for if under such circumstances he could refuse to answer he would be withholding evidence for his adversary as well as himself. Production of a document could not be refused either at equity or common law (see *post*, p. 478), on the ground that it contained the evidence of his own title if it also contained evidence for the adversary. The point sug-



gests itself whether in cases of this kind any validity would be attached to the party's assertion to the effect that the answer would not support the case of the interrogating party, either directly, or indirectly by destroying his own, and that it would be disclosing his own evidence (by analogy to disclosing the contents of a document, see *post*, pp. 479, 481). See the form suggested *post*, App. Chap. I.

*Whateley v. Crowder*, 5 E. & B. 709, was an action against a surveyor for negligently performing his duty: and the interrogatories inquired into the particular steps the defendant took in order properly to perform his duty. The court allowed them though the answers might show the defendant's own case that he did use due diligence. In *Carew v. Davis* argued and decided at the same time on the same ground, being an action brought against an attorney for negligence in the conduct of an action in respect of a bond, among the interrogatories allowed was one asking whether he made inquiry and what and of whom concerning the circumstances under which the bond was obtained and the consideration for it. So in another case, an action against a valuer for negligence and want of skill in conducting the valuation, the defendant was compelled to answer interrogatories inquiring into the basis of his valuation: *Turner v. Goulden*, L. R. 9 C. P. 57.

In a proceeding by an alleged contributory under the winding-up of a company to obtain relief from liability on the ground of misrepresentation the official liquidator was held bound (as if he had been a defendant in an action for the same purpose) to disclose both by way of answers to questions and production of the actual documents the grounds and particular materials on which he had come to a particular conclusion as to the value of certain assets for the purpose of making a call: *Re Barned's Banking Co.* L. R. 2 Ch. 350: (see this case also cited *ante*, pp. 112, 128).

In a case of *Stainton v. Chadwick*, 3 M. & G. 575, the plaintiff alleged that the defendant had by false and fraudulent evidence in support of some statements in a petition obtained an ex parte order from the court vesting in him the legal estate of property to which he the plaintiff was properly entitled. The defendant was ordered to disclose this evidence in answer to interrogatories. For, p. 585, the plaintiff's right to the proof of the alleged fraud was not repelled because the defendant might be thereby disclosing the evidence on which he was going to rely, although such an effect might be incidental to or consequential on the discovery, the immediate object being not to compel such a disclosure but to prove the alleged fraud, his own case. And see *Chadwick v. Chadwick*, 22 L. J. Ch. 329, commenting on this case.

Lord Romilly in *Commissioners of Sewers v. Glasco*, 15 Eq. p. 304, after admitting the accuracy of the proposition laid down in *Hoffmann v. Postil* (see *post*, p. 467) to the effect that a plaintiff was bound to answer questions tending to destroy his case, and saying that at the same time he was not bound to answer questions as to matters which tended to support his case, thus states the general position. "The party interrogating (whether plaintiff or defendant) was always entitled to discovery of everything which made out his own case or which showed that he was in the right but not to discovery of matters which supported his opponent's case or showed that his opponent was in the right." And he suggests as an illustration that if in the case before him, which was an action to establish right of common and where the defendant had interrogated the plaintiff as to the instances in which the right had been enjoyed, the defendant had alleged that in certain cases the right set up by the plaintiff had been claimed and successfully resisted he would have had a right to interrogate as to those cases, but that as the defence was then presented the interrogatories required the plaintiff to disclose the evidence in support of his case.

In an action by the insured against an insurance company upon the policy the company relying on the particular clause of forfeiture were compelled to



answer interrogatories inquiring as to their practice in twenty similar cases to that of the plaintiff for the purpose of showing that their ordinary practice was to waive the forfeiture, for it was not their evidence, as they relied on the contract, and the bill contained allegations sufficient whereon to found the interrogatories: nor was it unreasonable, for only twenty instances were asked for: *Girdlestone v. North British Insurance Co.* L. R. 11 Eq. 197.

In *Gartside v. Outram*, 5 W. R. 35, a suit by a firm to restrain a former clerk from disclosing the transactions connected with their business, the clerk set up as a justification for such disclosure specific charges of fraud in the plaintiff's mode of conducting business. He was allowed to interrogate for the purpose of establishing these charges: though he would not have been allowed to file interrogatories for the purpose of obtaining a disclosure of their private books on a mere roving suggestion that there might have been fraud.

Where a defendant to an action to recover the balance of money due on a sale of a public house counter-claimed for the return of his deposit on the ground of false representations as to the takings, he was allowed to interrogate as to the monthly receipts: *Bartholemew v. Rawlins*, W. N. 76, p. 56.

See also *Blight v. Goodliffe*, 18 C. B. N. S. 757, action for misrepresentation by defendant as to a business, where the plaintiff interrogated whether a certain book contained accurate entries.

Where an action was brought on a contract to sell at a fair price the plaintiff alleging that an exorbitant price was charged was allowed to ask for the names of the manufacturers and the prices at which the goods were purchased from them: *Mazarredo v. Maitland*, 3 Mad. 66.

In *Hall v. Liardet*, W. N. 83, p. 175, an action for work and labour done in making model machinery for exhibition Field, J. in chambers considered that it was legitimate for the plaintiff to ask the defendant (the defence being that it was defective and unworkable) whether it did not obtain a prize and who (but see *post*, p. 472) the judges were, and further that it would be open to the defendant to state in his answer that the judges gave a prize without reference to its construction or testing its working capacity.

4. *As to any Distinction in this respect (see B. ante, p. 458) between the right of the Plaintiff and of the Defendant.*

In a case of *Hoffmann v. Postil*, L. R. 4 Ch. 673 (and see *Commissioners of Sewers v. Glasse*, ante, p. 466) before the Court of Appeal, an action for infringement of a patent, the defendant denying its validity, Giffard, L. J. p. 693, considered that, it being a defendant's business to destroy the plaintiff's case, he was entitled to discovery for that purpose such as a plaintiff would not be entitled to and accordingly that the defendant had a right to ask all questions which were fairly calculated to show that the patent was not a good patent and that what was alleged to be an infringement was not one. See further as to this case *post*, p. 555, in connection with patent actions: and see also *Borill v. Goodier* and other patent actions there, p. 553, referred to. This case is referred

to in Daniell, Ch. Pr. p. 1407, as an authority for the proposition that there is a general distinction in this respect between the positions of the plaintiff and defendant. So in *Ashley v. Taylor*, 37 L. T. 523 (reversed on appeal, see *ante*, p. 454), Malins, V. C. says, at p. 523, that a plaintiff is entitled to discovery of all matters tending to support his case, a defendant of matters tending to destroy the plaintiff's case. See on the other hand Brett, M. R. in *Grumbrecht v. Parry*, cited *ante*, p. 459.

The true view seems to be this. If it is a part of the plaintiff's object in the action to destroy the defendant's case he is as much entitled to discovery for this purpose as is a defendant in the converse case. But whereas in almost every proceeding it is the defendant's object to destroy the plaintiff's case it is not so with the plaintiff. The plaintiff in an action for the recovery of land, see *post*, pp. 516, 525, or for the recovery of other property, see *post*, p. 516, must establish his own right: it is useless for him to show merely that the defendant has no right. In such cases he is not entitled to discovery which tends only to impeach the defendant's case and does not tend to affirmatively support his own. See also *post*, p. 498, as to this point in connection with the production of documents: and *post*, p. 530, referring to *O'Connor v. Malone*: and *ante*, p. 458.

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#### C. *Discovery for the purpose of paying Money into Court: or in Reduction of Damages.*

It has been seen (*ante*, p. 28) that though there is no general principle that a plaintiff is entitled to discovery for the sake of knowing whether or not it is worth his while to go on with the action yet in some cases discovery has been allowed for this purpose. So in favour of a defendant wishing to pay what is justly due into court, interrogatories (or generally in reduction of damages: see *Pape v. Lister*, and other cases *post*, p. 471, but see *Clarke v. Bennett*, *post*, p. 470) have been sometimes allowed in the common law courts which

approached very closely to an inquiry into the adversary's evidence.

In *Wright v. Goodlake*, 34 L. J. Ex. 82, an action for infringement of copyright in a pamphlet by copying it into "The Times," interrogatories by the defendant were allowed inquiring as to the date of publication of the pamphlet, the claim to the copyright, and the number of copies sold, apparently only for the purpose of ascertaining how much he should pay into court. In *Jourdain v. Palmer*, L. R. 1 Ex. 102, an action for breach of contract whereby the plaintiff's patent became void, the court refused to follow *Wright v. Goodlake*, that being an action of tort, and disallowed interrogatories inquiring into the probable value of the patent as asking him to state his case beforehand (see as to this expression *ante*, p. 447). In *Dobson v. Richardson*, L. R. 3 Q. B. 778, an action for breach of agreement to deliver bills of exchange, the court declined to follow *Jourdain v. Palmer* and allowed interrogatories by the defendant inquiring into the solvency of the persons liable on the bills and the amount of damages sustained by their non-delivery. In *Peppiatt v. Smith*, 3 H. & C. 129, an action for negligence in leaving open a cellar trap through which the plaintiff fell and was injured, the defendant was not allowed to interrogate as to the circumstances under which the accident happened, although the defendant wished to show contributory negligence, nor as to the injuries received nor the medical attendance.

However these last four cases were all referred to in *Frost v. Brook*, 23 W. R. 260, an action for damages in respect of personal injuries received by the breaking down of a stand at some races, and it was considered that they left the court free to deal with the question on principle; and that in this case it was reasonable that the defendant, who wished to be guided as to the proper amount to be paid into court, should have information by way of answers to interrogatories which were on oath instead of by particulars which were very general and not on oath (see *ante*, p. 451, as to discovery of particulars), and should therefore be allowed to ask the plaintiff to state on oath the general nature of the plaintiff's case in a form sufficiently specific for that purpose. The plaintiff was accordingly compelled to answer where and how he fell, how he received the injuries, whether he walked home or how, the nature and extent of the injuries, whether he was seen by one or more medical men, or other persons, and when and where and how often and long, the amount of their charges and whether paid; whether extra help was had in his business and for how long, and how much was paid; the receipts of the business six months before and six months after the accident (see also *Anon.* W. N. 76, p. 53, cited *post*, p. 515): how long he was confined to his bed and to the

house: an account how his business suffered: but not the names of the medical men or other persons who attended him during his illness nor of the persons who had assisted him in his business, as being (see *post*, D.) his witnesses.

So in *Horne v. Hough*, L. R. 9 C. P. 135, an action on contract where the defendant had paid a certain sum into court and where therefore the question at issue was simply as to the amount of damages suffered, it was held that a defendant desiring to pay the proper amount into court was held entitled to discovery for that purpose: the plaintiff here had given particulars of damages.

But in a recent case, *Clarke v. Bennett*, 32 W. R. 550, it was held (per Smith, J. at all events) that where the defendant traverses the whole claim and pays no money into court, he has no right to discovery as to the amount of damages, that (per Smith, J.) by payment into court a defendant impliedly did not traverse the whole claim but raised an issue as to damages, the above cases resting on the footing that interrogatories were admissible only where they related to the issues between the parties, and that as no plea could have been put in as to the amount of damages, the only way of putting the amount in issue was by paying money into court. The judgment of Day, J. is not based solely on this ground: that is to say, the learned judge considered that where the claims could not be known to the defendant it was reasonable that he should have an opportunity of showing that they were extortionate or of knowing on what calculations they were based and so of paying what was justly due into court, but that in the case before him there were no such difficulties, nor had he paid money into court. It is submitted that both grounds (certainly the first) are too narrow. It has been pointed out *ante*, p. 21 (and see the cases *post*), that the amount of the claim has been always considered in equity to be a matter in question and therefore a legitimate subject of discovery. The true view of the above cases would seem to be that where the defendant admits his liability and is desirous only of knowing what is a proper amount for him to be called on to pay, he is entitled to discovery of a nature which but

for this purpose might be inadmissible as involving a disclosure of the adversary's evidence.

In *Clarke v. Bennett* (leave to interrogate having been previously obtained) the interrogatory (inquiring into the receipts and profits of his business and his income tax returns) was held for other reasons, as well as the above, vexatious, and was ordered to be struck out, see *ante*, p. 107.

In *Harris v. Collett*, 26 Beav. 222, a bill of discovery in aid of the defence to an action by a tradesman against an insurance company to recover on a fire policy, it seems to have been considered that the defendant was entitled to have discovery as to the goods books prices amount of profits in the business and other matters connected therewith in order to show that the amount claimed was exorbitant.

In *Pape v. Lister*, L. R. 6 Q. B. 242, an action for breach of promise of marriage, the defendant was allowed to inspect letters from himself to the plaintiff bearing only on the question of the amount of damages, he admitting the promise.

See also the cases in the Divorce Court cited *post*, Bk. III. Ch. III. Sect. II.: and in the Admiralty Court, cited *post*, *ibid.* Sect. III.

In an action by the administratrix (widow of the deceased) under Lord Campbell's Act, the defendant company having interrogated her as to the pecuniary damages suffered by her through the deceased's death, ultimately an oral examination under r. 11 was directed: *Vicary v. G. N. R. Co.* 9 Q. B. D. 168.

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#### D. *Discovery of the Names of Witnesses.*

The party is not bound to give the names of the witnesses whom he intends to call at the trial: Cotton, L. J. in *Eade v. Jacobs*, 3 Ex. D. p. 337, and see *A. G. v. Gaskill*, 20 Ch. D. p. 529: not therefore of persons present when an alleged consent was given by a deceased person: *Eade v. Jacobs*.

This decision seems to have been disregarded by Jessel, M. R. in chambers as contrary to equity practice: see *Johns v. James*, 13 Ch. D. p. 373: and to have been doubted by

Bacon, V. C. *ibid.* p. 374, where in deference to this decision the objection to disclosing the persons in whose presence certain communications took place was abandoned. It was followed by Bacon, V. C. in *Lyon v. Tweddell*, 13 Ch. D. 375, discovery of the persons in whose presence certain language was used being refused. In *Storey v. Lennor*, 1 Keen, p. 357, Lord Langdale says, "The defence is that the letters may disclose the names of the witnesses and the evidence and so indeed may every discovery which the defendant may be required to give. In telling the truth as he is bound to do he may incidentally disclose to the plaintiff that which may enable the plaintiff to learn the names of the witnesses and the nature of the evidence: and if this consequence could be used as a ground for resisting a discovery one of the most extensively useful parts of the jurisdiction of courts of equity would be lost. It occurs constantly to ask the defendant when where and in whose presence particular transactions took place, and he cannot protect himself by saying that to tell in whose presence the transactions took place would disclose the names of his witnesses:" see also *ante*, p. 411.

See also *Frost v. Brooke*, *ante*, p. 469, and *Peppiatt v. Smith*, *ante*, p. 469, where some of the interrogatories disallowed inquired as to the persons present at the accident or who had attended the plaintiff. See also *Preston v. Carr*, 1 Y. & J. p. 179, where discovery of the names of witnesses was held improper: *Daw v. Eley*, *post*, p. 553: and *O'Connor v. Malone*, *post*, p. 530. On the other hand, see *Hall v. Liardet*, *ante*, p. 467.

See also *Kuhligier v. Bailey*, *ante*, p. 457, where the persons whose names were required were referred to in the pleadings.

In *Potter v. Metropolitan, &c. Co.* 28 L. T. 231, an action for damages arising out of a railway accident, the plaintiff was allowed to ask for the names and addresses of the inspector, and of two other servants of the company who accompanied her home after the accident, and of the engine-driver of the train, but not whether there were any and what servants of the company witnessed the accident.

In an action for slander it has not been the modern practice

at common law to give by way of particulars the names of the persons to whom or in whose presence the plaintiff alleges that the defendant uttered the slander: *Bradbury v. Cooper*, 12 Q. B. D. 94, p. 95: *Winyard v. Cox*, W. N. 76, p. 106: *Early v. Smith*, Ir. C. L. R. App. 35, p. 41. But where the charge was not that the defendant himself uttered the slander but that he requested T. to utter it and therefore he could not tell where or under what circumstances it was uttered and would be unprepared to meet the case against him, the plaintiff was ordered to give the names of the persons: *Bradbury v. Cooper*, for per Smith, J. these particulars went to the facts on which the plaintiff relied not, the evidence, citing *Eade v. Jacobs* (see *ante*, p. 446). The occasions on which the slander has been uttered have been ordered in order that the defendant might know what case he had to meet: *Early v. Smith*.

Qu. whether the party may decline to answer without stating any reason, or whether he must state that any persons who were present he contemplates calling as witnesses. Otherwise he might prevent the other party from calling persons who might give evidence in his favour. In *Eade v. Jacobs*, the interrogatory was struck out under the old rule. In *Lyon v. Tredell*, the objection was taken in the form that the adversary was not entitled to require the names and addresses of his witnesses. The report in *Johns v. James* does not state the form. In *Kelly v. Wyman*, cited *ante*, p. 457, it was argued that the names of the canvassers were required that they might call them as witnesses, for that the defendant would not call them. See also *Daniell v. Bond*, *ante*, p. 185, where it was considered a ground for ordering inspection of documents that they would disclose the names of persons who would be witnesses for the party seeking discovery.

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#### E. *Interrogatories as to Documents or their Contents.*

Interrogatories founded upon allegations (actual or imaginary) made in respect of a document or documents of the



adversary must no doubt be answered : see *post*, p. 505 : and *ante*, pp. 257, 259 : discussing the subject of impeached documents : see also *post*, p. 491, discussing a suggestion in *A. G. v. Emerson*. In *Adams v. Lloyd*, referred to *post*, it was said, p. 366, that it would be legitimate for the defendants to ask the plaintiff whether he claimed under a conveyance from P. anterior to that under which they claimed.

As to interrogatories asking for a list of the dates or contents of or parties to the adversary's documents the position would seem to be as follows. The necessity is pointed out (*post*, p. 477) of distinguishing between the classes of documents, those which contain the evidence or information as to the evidence to be used at the trial, and those actually constituting in themselves the adversary's evidence. Documents of the first kind are discussed both in relation to interrogatories and to production, *ante*, Chap. II. : as to the production of documents of the second kind it is pointed out (*post*, p. 479) that if the adversary swears that they constitute exclusively his own evidence (or relate exclusively to his own case, not being evidence, see *post*, p. 481) and do not contain anything tending to impeach his own case in favour of the adversary or to support that of the adversary they are protected ; and that under some circumstances it might be necessary for him to disclose the character and nature of each document covered by the assertion, while under other circumstances it may be sufficient merely to describe their general nature, as for instance "title deeds" or "manor records," &c. or even to give no description at all, see *post*, p. 488. Where then the adversary has filed an affidavit of documents and claimed and been allowed protection for a number of documents as so constituting exclusively his own evidence no interrogatories should it is conceived be allowed asking what are the dates or contents of or parties to them : see also *post*, p. 491, where some observations apparently contra of Brett, M. R. in *A. G. v. Emerson* are considered. Where no such claim for protection has been as yet allowed by the court, then subject to the question whether the interrogatory is not an improper one as inquiring into matters discovery of which

should be obtained by the machinery of the affidavit of document (see *ante*, p. 115) the adversary should it is conceived be able to protect himself from all discovery of the nature and character of any documents which he could protect from production in his affidavit as constituting exclusively his own evidence (or relating exclusively to his own case) and respecting which he makes the same assertions in his answer as he would effectually make in his affidavit of documents.

The production of a document being a mere substitute for setting out the contents in the answer, where there is no right to production there can be no right to discovery of the contents, nor generally to a description (unless required for the purpose of the decree, as where a part of the decree may be an order for their delivery: see Wigr. pl. 291: or as in *Duncombe v. Davis*, 1 Ha. pp. 189—190, where a list of securities held by bankers was required: and see *ante*, pp. 21, 182): see Bramwell, L. J. in *Adams v. Lloyd*, 27 L. J. Ex. 499, p. 507, Wigr. pl. 285—290, 395: *Neate v. Latimer*, 11 Bligh, p. 154: and *ante*, pp. 151, 255.

The description of protected documents necessary to be given in the affidavit is not for the purpose of discovery but for the purpose of supporting the claim to protection: see *post*, p. 491, and *ante*, p. 230.

The party has no right to call for any information concerning his adversary's evidence: Hare, p. 268. In *Buden v. Dove*, 2 Ves. 444, it was said that the plaintiff could not have a discovery of deeds and writings of the defendant's title though he might ask what there were of his own title: and see Hare, p. 196. In *Sutherland v. Edwards*, 17 Beav. 209, the defendant was held not bound to set out a list of documents relating to his own title. In *Shaftesbury v. Arrowsmith*, 4 Ves. p. 72, it was said that the heir in tail might ask what documents the defendant had creating estates tail.

The point was elaborately discussed in *Adams v. Lloyd*, *ante*. In this case the defendant administered interrogatories asking for a list, the dates of and parties to the plaintiff's documents: the plaintiff answered that all his documents evidenced his own title (to mines) and did not show

any title or right in the defendant. It was held that a party had a right to ask his adversary whether he had any documents containing anything that supported his (the applicant's case): and that if the adversary replied that he had none such, all his documents supporting his own title only, there was an end of the matter and no further information about them could be required. Interrogatories cannot be put so as to compel him to disclose how little parchment he has in support of his title: Pollock, C. B. *ibid.* pp. 505, 364: and see *post*, p. 518.

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## PART II.

### DISCOVERY OF THE EVIDENCE OF A PARTY'S CASE BY WAY OF DISCOVERY AND PRODUCTION OF DOCUMENTS.

The application of this (see (3), *ante*, p. 310) limitation of or exception to the right of discovery to the discovery and production of documents is attended with considerable difficulty. No one disputes the propositions that a party has no right to see the strength of his opponent's cause or the evidence of his title before the hearing: *Davers v. Davers*, 2 P. W. 410; or that he has no right generally speaking to look into the opponent's title where it is in contradiction to his own: *Stroud v. Deacon*, 1 Ves. 37. The question is how these propositions are to be applied in practice.

If there be one point in the law of discovery which is better established than another it is that which denies to a plaintiff (that is to say an applicant for discovery whether plaintiff or defendant in the action) a right to look into the defendant's evidence for the chance of what he may fish out to his advantage: Wigr. pl. 394: see also *post*, pp. 495, 506, 516, and the common law practice, *post*, p. 511. Where an interrogatory is put the court has before it the means of judging whether or not it savours of an inquiry into the adversary's evidence: but where the production of a document is required, the question whether or not its production can be regarded as involving a disclosure of his evidence must generally depend upon its contents of which the court is *ex necessitate rei* (see

*ante*, p. 233, as to cases where the court has inspected documents) wholly or partially ignorant. Two points necessarily arise in this connection. One, the extent to which the statement of the party can be accepted as to the contents or nature of his documents: the other, the character or manner in which the document will disclose his evidence. Documents are in fact of such different natures that it is impossible in practice to apply to all of them the same considerations. Some documents, such as title deeds, necessarily constitute or are evidence in themselves. Production of such documents will disclose the party's evidence. But there are other documents which do not constitute evidence though they may equally disclose the party's evidence: they may contain the evidence which is intended to be used whether orally or by affidavit at the hearing, or information as to the evidence which can be obtained. In treating of such documents altogether different considerations obviously arise. It is clear therefore that this principle cannot be applied in the same manner indiscriminately to all documents of whatever nature with any intelligible result. In fact the consideration of the second of the above classes of documents falls in more naturally with the subject of legal professional privilege in Chap. II. where accordingly the principles of protection applicable to those documents are discussed. It may however be noted that a document of this kind is protected where it satisfies the conditions of protection laid down in Sect. II. *post*, that is to say where it relates exclusively to the party's own case and contains nothing supporting the adversary's case or impeaching his own, the protection which it receives by virtue of the principles discussed in Chap. II. being independent and additional: see *post*, p. 484, and *ante*, p. 410.

I. *Documents constituting Evidence of the Party's Case or Title as distinct from Documents containing the Evidence intended to be given either Orally or by Affidavit at the Trial.*

As to the effect of Ord. XXXI. rr. 15—18 in preventing a plaintiff or defendant from using in evidence any docu-

ments inspection of which has been refused to the adversary, see *ante*, p. 244: as to documents of this kind which it is the object of the action to set aside reform or otherwise impeach or in respect of which special charges are made: see *ante*, p. 256, (and also *post*, p. 505): as to documents of this kind in the possession of purchasers for value without notice see *post*, Ch. IV. Sect. I.: of mortgagees see *post*, Ch. IV. Sect. III.: as to documents of this kind in which the adversary has an interest of the nature of property see *ante*, Bk. I. Ch. VII.

Documents constituting evidence of the party's case or title are not protected unless they are solely or exclusively evidence of it. Where a document is or may be evidence for or may assist the adversary as well as himself, he cannot withhold it: see Wigr. pl. 325: *Burrell v. Nicholson*, 1 M. & K. 80: *Coster v. Baring*, 2 C. L. R. p. 813: *Stainton v. Chadwick*, 3 M. & G. p. 585: *Smith v. Beaufort*, 1 Ha. p. 520: on app. 1 Ph. p. 220: *Collins v. Yates*, 27 L. J. Ex. p. 151: *Combe v. Corp. London*, 1 Y. & C. C. C. p. 652: on app. 15 L. J. Ch. pp. 82, 83: although his own evidence may be thus disclosed: *London Gas Light Co. v. Chelsea*, 6 C. B. N. S. pp. 425—426: *Stainton v. Chadwick*, p. 585. It is not enough for a man to say that such and such documents are his title deeds: it is no ground for refusing their production so far as they may be necessary to establish the adversary's case: *A. G. v. Thompson*, 8 Ha. p. 113. The decision in *Bolton v. Liverpool* considered *post*, pp. 495, 506, where protection was extended to documents for which protection was apparently only claimed as being documents evidencing the party's own title, has always been supported on the ground that under the special circumstances they must be taken to have been documents exclusively evidencing his title: see *Smith v. Beaufort*, p. 221. But see as to title deeds and other documents of a defendant in actions for the recovery of land, *post*, Pt. III. Sect. I. (b).

That a document which constitutes evidence exclusively of the party's own case or title is protected is obvious. The point which arises for consideration is how the court is to be satisfied that the document has that character without in-

specting it. In *Combe v. Corp. London*, 1 Y. & C. C. C. pp. 650—651, Knight Bruce, V. C. laid down definite rules and conditions (expressly approved in a recent case of *A. G. v. Emerson*, 10 Q. B. D. 191) applicable to the protection of a party's evidences:—"To protect a defendant from discovery or production of documents relating to the subject of dispute, it is not sufficient that it should be evidence of his title, or contain evidence that he intends and is entitled to use in support of his case. It may also be of a similar character with regard to the plaintiff's case, either in a directly affirmative manner, or by exhibiting matter at variance with the defence or tending to impeach it. I do not\* at present refer to the instances in which a document forms the common title, or is a subject of the mutual and common right of the plaintiff and defendant. If it be with distinctness and positiveness stated in an answer, that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production unless the court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title, or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected: nor, I apprehend, is it protected, if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness." The rules and conditions here laid down are considered in detail, *post*, Sect. III.

There used to be a formula in very general use in reference to production of documents, namely that in order to entitle an adversary to the production of any (limited to title deeds by some judges: see the cases *post*, p. 493) document he

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\* See these documents considered *ante*, Bk. I. Ch. VII.

must show by admissions in the party's answer that he had an interest in it; Wigr. pl. 295, 324: *A. G. v. Thompson*, 8 Ha. p. 112. The interest which he must thus have shown was defined to be an interest for the purposes of the trial of the issue: Wigr. pl. 295 and 324: (not an interest in the nature of property: see *A. G. v. Thompson*, p. 112: as to this see *ante*, Bk. I. Ch. VII.). Such an expression therefore was only equivalent to saying that the adversary must show from the answer that the document was or might be evidence which might prove or lead or assist him to prove his case: see *A. G. v. Thompson*, p. 112: Wigr. pl. 295. Now any document which is relevant may *prima facie* so help him. And the question is, as it was then, what will be accepted by the court from the party as sufficient qualification of his admission of relevancy so as to justify it in protecting the document. The formula therefore was of no practical use except as a convenient method of expression, and is treated in Wigr. pl. 299, as a mere abstract term. The sound position from which to discuss the question, and which is practically that adopted in Wigr. pl. 299, 301, and by him as V. C. in *Smith v. Beaufort*, 1 Ha. pp. 519—520, 523—524 (see however *post*, p. 483 n.): by Lord Cottenham, *ibid.* 1 Ph. p. 219: by Lord Lyndhurst in *Combe v. Corp. London*, 15 L. J. Ch. p. 83: and see *Tyler v. Drayton*, 2 S. & S. pp. 310—311: is this. The adversary must show from the party's admissions that he has in his possession certain relevant documents. The party is then *prima facie* bound to produce them and the onus is on him to show why they should be protected. One of the grounds on which they will be protected is that laid down in the above-quoted passage from the judgment of Knight Bruce, V. C. in *Combe v. Corp. London*.

It has been seen *ante*, p. 246, that in equity there was no general obligation to produce documents referred to in the pleadings (that is to say in the bill or in the answer in its character of the defence). The defendant would therefore be protected from producing the deed on which he founded his title: *Sampson v. Sucettenham*, 5 Mad. 16: or which made out his own case by destroying the plaintiff's case: *Howard*



*v. Robinson*, 4 Dr. p. 526: and see *Tyler v. Drayton*, 2 S. & S. 309: and *ante*, pp. 254, 261: (see now as to discovery of the instrument alleged to take away the plaintiff's title, *Fortescue v. Fortescue*, *post*, p. 490): and the court will accept his description of the nature or effect of the document, even where there were counter-allegations by the plaintiff, if he properly negatived them: see *ante*, pp. 257—260, and *post*, p. 505: the only exception was in respect of documents falling within the rule of *Hardman v. Ellames*, see *ante*, p. 251. See as to documents referred to in the bill, *ante*, p. 246. See as to the present practice in respect of documents referred to in the pleadings, *ante*, p. 244.

See *Wasney v. Tempest*, 9 Beav. 407, where a deed, under which the defendant asserted in his answer that his father, through whom the plaintiff claimed, was only tenant for life and he himself tenant in tail, was protected: *Glover v. Hall*, *ante*, p. 254, where the uses of the deed were set forth, and this was held a sufficient answer to the plaintiff's allegations: *Plunket v. Cavendish*, 1 R. & M. 713: *Wilson v. Forster*, M'Cl. & Y. 274, where production was refused of a deed described as relating to property of which the testator was tenant in tail and not to property of which he was tenant in fee, which was the case put forward by the plaintiff: see further as to this case, *post*, p. 510.

See also the cases cited, *ante*, p. 261 to p. 263.

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## II. *As to Documents which relate to the Party's own Case or Title, but do not constitute Evidence of it.*

A document may be evidence for the adversary though not for the party himself, or it may be evidence for neither party, for production of documents is not (see *ante*, pp. 183—185) confined to documents which may be used in evidence. It is difficult to see how such documents can be brought within the language in which the conditions of protection were laid down by Knight Bruce, V. C. in the passage cited above. The question which arises for consideration is whether and to what extent documents not constituting evidence of the party's title or case but only relating to it and containing nothing impeaching it or forming or supporting the adversary's title or case are protected and how far the party's oath

to this effect is accepted. The conclusions arrived at in the following pages may be thus stated:—

(a) It is not sufficient to say of an admittedly relevant document that it will not (either directly by supporting it or indirectly by impeaching his own case or title) prove or assist or tend to prove or assist the adversary's case or title:

(b) It is not sufficient to say of an admittedly relevant document that it exclusively relates to the party's own case or title:

(c) It is sufficient to make the combined assertions (a) and (b). If such an assertion is made respecting a document, it seems that the court will protect it equally with a document constituting evidence for the party. The only case which seems to draw any distinction is *Peile v. Stoddart*, cited *post*, p. 485: see also a common law case *Hunt v. Hewitt*, cited *post*, p. 512: and see *Combe v. City of London*, *post*, p. 496.

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(a) See *ante*.

It seems clear that where a party admits a document to be relevant to the matters in question his assertion that it will not (whether directly or indirectly as above) prove or assist the adversary's case is not sufficient to protect it (see as to documents asserted to be irrelevant to the particular issue, *ante*, p. 186), unless he goes farther and says either that it evidences his own title or case and consequently evidences it exclusively, or that it relates exclusively to it. There is it is believed no modern case in equity in which the oath of the party as to the effect of a document admitted to be relevant to the issue in its bearing on that issue has been accepted unless accompanied by an assertion either that it is evidence of his own case or that it exclusively relates to it.

“An admission in general terms that the documents in the schedule are relevant to the plaintiff's case throws upon the defendant who makes that admission the onus of excusing himself from producing the documents in the schedule. The answer in this case admits that the documents in the schedule are relevant to the plaintiff's case, and that admission taken alone will *prima facie* entitle the plaintiff to inspect them (citing *Storey v. Lennox*, 1 M. & C. 525: 1 Keen, 341: *Tyler v. Drayton*, 2 S. & S. 309: *Neesom v. Clarkson*, C. P. Coop. p. 93): and it is abundantly clear that where documents in

the defendant's possession are admitted to be relevant to the plaintiff's case,\* the plaintiff and not the defendant has a right to judge for himself of the materiality of such relevant documents: and that a suggestion in the answer that the relevant documents will not prove the plaintiff's case is not alone an answer to a motion for their production:" Wigram, V. C. in *Smith v. Beaufort*, 1 Ha. p. 519. See also a passage in Lord Hatherley's judgment in *Mansell v. Feeney*, cited *ante*, p. 188. See passages to the same effect and enforcing the same doctrines in *Smith v. Beaufort*, 1 Ph. pp. 219—220 (Lord Cottenham): *Goodall v. Little*, 1 Sim. N. S. pp. 161—162 (Lord Cranworth): *Newton v. Beresford*, 1 Y. p. 381 (Lord Lyndhurst): Wigr. Pl. 300.

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\* The learned author in his book is not always consistent in the use which he makes of the expression "plaintiff's case": in some places treating an admission of relevancy to the plaintiff's case merely as equivalent to an admission of general relevancy to the matters in question, in other places giving it a more restricted signification. And this is especially noticeable in connection with the subject of the production of documents. In Pl. 299 he regards an admission of relevancy to the plaintiff's case alone as entitling a plaintiff to an order for production . . . unless from the nature of the documents themselves (*e.g.* general title deeds or that they are the defendant's evidence) there is ground for inferring, notwithstanding their relevancy, that the plaintiff has no interest in them, regarding therefore documents which are the defendant's evidences (that is to say exclusively his evidences) as being relevant to the plaintiff's case: and so in *Smith v. Beaufort*, *ante*, though subsequently in his judgment he seems to use it in the narrower sense when emphasizing the particular admissions made: see further as to the case, *post*, p. 506. In Pl. 314, on the other hand he says that the rule that the defendant is not to be the judge of the effect of evidence applies only to those cases in which an admission of the relevancy of the documents to the plaintiff's case has given the latter a right to call for their production, that such an admission is incompatible with a denial by the defendant of that case, and necessarily supposes an admission to some extent of the plaintiff's case; he suggests in illustration a general charge by the plaintiff that such and such conveyances were obtained by fraud and further that the defendant had documents relating to the preparation of these conveyances whereby the truth of the charge would appear. If, he argues, the defendant denies the fraud he denies the plaintiff's case, and the relevancy of the documents to the plaintiff's case is of necessity excluded by that denial. This way of treating the question seems unsound. The issue is whether the conveyances were obtained by fraud or not. The documents give the history of their preparation and are therefore relevant to this issue. The defendant may deny the fraud, but the documents are not thereby deprived of their relevancy to the issue: and can only be protected as constituting solely his own evidence. Later Pl. 314, 315, 403 the learned author inclines rather to this view; for he considers that, by a denial of the plaintiff's allegation that the documents would show the fraud, their defensive character is preserved: see *ante*, pp. 257—260, and *post*, p. 505, as to the effect of negating charges made by the adversary against the party's documents: and see *ante*, pp. 11—13, as to referring the relevancy of discovery to a party's case and not the matters in question: and *ante*, p. 182, and *post*, p. 500, as to the old form of admission of relevancy, that is to say, to the matters mentioned in the bill.

(b) See *ante*, p. 482.

It seems equally clear that it is not enough to say of an admittedly relevant document that it exclusively relates to the party's own case or title.

There is no case in equity in which it has ever been expressly held sufficient. And in *Bustros v. White*, cited *ante*, p. 417, where protection was claimed for correspondence with agents (containing mere matter of opinion, p. 427) as relating only to the plaintiffs' and not to the defendants' case, there being no assertion (and it seems, see *Bewicke v. Graham*, 7 Q. B. D. p. 401, that no such assertion could with truth have been made) to the effect that the documents did not impeach the plaintiffs' or support the defendants' case, production was ordered. See also the conditions of protection laid down in *Greenwood v. Greenwood*, *post*, p. 486, and generally *post* (c).

See also *Felkin v. Herbert*, cited *ante*, p. 395, and *post*, p. 501.

In *Lyell v. Kennedy* it was suggested that it was sufficient for a defendant in an ejectment action to say that the documents related solely to his own title, but see as to this *post*, p. 520.

The expression is also used in Ord. XXXI. r. 15, but only in reference to documents which may be used by the party in evidence, and as a means of escaping the penalty of not being allowed to use them in default of production, not as constituting in itself an absolute ground of protection from production: see *ante*, pp. 243—245.

In Wigr. the propositions are based on the footing (see *ante*, p. 444) that a party is entitled only to discovery relating to his own case.\*

From this point of view the adversary would not be entitled to production of a document relating exclusively to the party's own title or case. And in fact it is so laid down both generally as to discovery: Wigr. Pl. 346, 375: and see Hare, p. 5: and particularly in respect of documents: Wigr. Pl. 304, 321, 373, 386. And though in many places, Wigr. Pl. 292, 299, 314, 333, and see Hare, pp. 183, 185, the documents under consideration are called the party's evidences it does not seem that it is intended to confine this expression to documents that are strictly evidence: see for instance Wigr. Pl. 373. And in *Smith v. Beaufort*, 1 Ha. pp. 520, 522, Wigram, V. C. con-

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\* It has been pointed out *ante*, p. 483 n. that the learned author is not always consistent in the way in which he uses the expression "discovery relating to the plaintiff's case."

siders that where a document relates exclusively to the party's own case he may withhold it. See as to the common law practice in this respect under the C. L. P. Acts *post*, Sect. IV. and in particular *Hunt v. Hewitt* cited *post*, p. 511.

In *Peile v. Stoddart*, 1 M. & G. 192, bill of discovery in aid of the defence to an action at law to recover upon an alleged contract to grant an annuity, protection was claimed for (among other documents) letters passing between the plaintiff and defendant as being or containing the evidence on which the plaintiff intended mainly to rely in the action, and as not containing any evidence tending to support the defendant's pleas, and as not material to his case. Lord Cottenham distinguished between the letters from the defendant to the plaintiff and those from the plaintiff to the defendant on the ground that the former would be evidence for the plaintiff and not for the defendant, while the latter would be evidence for the defendant and not for the plaintiff: that the defendant was clearly not entitled to see what he had written to the plaintiff: as to the latter that the charge and admission of relevancy was not to the contract, which was the sole point at issue in the action, but only to the matters mentioned in the bill, and therefore he was bound to give effect to the plaintiff's objection that they related only to his own title (see as to any distinction between a document constituting and not constituting a

#### 484. *At bottom of page.*

It should be observed that, as pointed out *post*, p. 494, the question is not whether a document which in fact exclusively relates to the party's own case or title is protected, but what specific and unambiguous assertions the Court requires the party to make concerning a document which it cannot look at in order to be satisfied that the document contains nothing which will assist the adversary.

case protection was extended to a bundle of documents without any description of or clue to what kind of documents they were, but said to relate solely to the defendants' case and not to the plaintiffs' case and not to tend to support it nor to the best of his knowledge information and belief (see as to this *post*, p. 502) to contain anything impeaching his own case: see this case further discussed *post*, p. 488. See also *Bulman v. Young*, 31 W. R. 766, cited *post*, p. 504, where a letter was protected on this ground. See also *Bustros v. White*, *ante*, p. 484: and *Martin v. Butchard*, cited *ante*, p. 405, where apparently no notice was taken of a claim to protection on this ground, the only question being whether they came within the doctrine of legal professional privilege.

The assertion will of course only be accepted where it is

in accordance with the subordinate conditions laid down by Knight Bruce, V. C. (see *ante*, p. 479, and *post*, Sect. III. where they are discussed).

In *A. G. v. Emerson*, 10 Q. B. D. 191, the language in which Knight Bruce, V. C. laid down the rule (see *ante*, p. 497) was adopted, and at p. 198 Baggallay, L. J. expressly calls attention to the condition that the documents must support the party's own title and must be intended to be or may be used in evidence (as to which see *post*, p. 492).

There is nothing to show that such a document would not have been protected in equity. Neither in *Goodall v. Little* (where however there was only (see *ante*, pp. 155, 189) the general assertion that thereby the truth of the matters in the bill would not appear), nor in *Mansell v. Feeney*, nor in *Smith v. Beaufort* (cited *ante*, pp. 480, 483), was there any such assertion of exclusive relevance: and in the last case at all events it was obvious (see this case discussed *post*, p. 506, and see also *Harris v. Harris*, *Cannock v. Jauncey*, and *Mansell v. Feeney*, cited *post*, p. 507) from particular admissions that some of the documents did not relate exclusively to his own title or case. The following observations may however be made:—

In *Greenwood v. Greenwood*, 6 W. R. p. 119, Kindersley, V. C. said that there were two rules as to which there was no dispute: one that when documents were scheduled it was assumed that they were relevant in some way to the matters in question in the suit: another rule was that if the defendant scheduled certain documents saying that those documents related exclusively to his own case, did not relate to the plaintiff's case, and contained nothing to defeat the case of the defendant, the court gave credit to that statement and would not order production unless (as to this see *post*, p. 503) it saw that the effect was misrepresented. And in many cases protection was claimed in this form (see for instance *Boyd v. Petrie*, cited *post*, p. 494; *Minet v. Morgan*, cited *post*, p. 494; *Owen v. Wynne*, cited *post*, p. 494): but in every case either each document was individually specified, or their general nature was stated (see *post*, p. 490): it could therefore be seen from the description whether they were such as could constitute evidence for the party, and a document constituting evidence for and relating exclusively to the party's case or title cannot but be a document exclusively evidencing it. And in fact, so far as it is possible to judge, the documents for which protection was so claimed were, except in the cases cited *post*, documents of this character.

It may also be noted that although in some cases (for instance *Peile v. Stoddart*, *ante*, p. 485, and *Smith v. Beaufort*, *post*, p. 506) among the documents for which protection has been claimed on grounds of this kind have been documents for which protection has also been claimed on the ground of

professional privilege, there is no case \* (but see *Llewellyn v. Baddley*, cited *ante*, p. 410) in which protection on these grounds has been expressly allowed or refused to documents lying on the border line of professional privilege, for instance communications between co-defendants or with unprofessional agents.

In *Smith v. Beaufort*, already referred to, Lord Cottenham draws attention to the alternative form in which protection was claimed "evidencing or relating," and says, p. 220, that no production was asked for, of any documents exclusively evidencing the party's title but of those under the second branch of the alternative, those namely which related both to his title and to the matters charged in the bill and did not exclusively evidence the defendant's title: see further *post*, p. 506 as to this case.

In *Lloyd v. Purvis*, 6 W. R. 507, where there was some doubt whether the actual expression used in the affidavit was "relating to or showing or tending to show their title exclusively" or "relating to and showing, &c.," Kindersley, V. C. seems to have considered that the former was evasive though there was a denial that they showed or tended to show any right or title in the defendants, and at p. 421 he says (on the supposition that the latter form had been used) that the documents were the plaintiff's evidence and showed his title. Although however the latter form was the more common (see for instance *Earp v. Lloyd*, cited *post*, p. 509) the former was used in *Greenwood v. Greenwood* before the same judge and see his judgment in that case cited *ante*, p. 486. See also *Peile v. Stoddart*, *ante*, p. 485.

### III. *The Application of the Rules and Conditions laid down in Combe v. Corp. London to Documents as well evidencing as only relating to the Party's Case or Title.*

These rules and conditions have been set out *ante*, p. 479.

It has been seen in Section II. that documents not in themselves constituting evidence for the party cannot be brought within the language in which those rules and conditions are laid down; but that according to the authorities a document which the party swears to relate exclusively to his own case or title and in effect to contain nothing impeaching it or tending to support the adversary's title is equally protected with a document sworn to evidence his own case or title and to contain nothing impeaching it or tending to support the adversary's title.

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\* In *Goodall v. Little*, 1 Sim. N. S. 155, documents on the border line of the rule of professional privilege were, as was then (see *Mansell v. Feeney*, 2 J. & H. p. 318, referring to *Harris v. Harris*, 3 Ha. 350) necessary, included among the documents covered by the assertion that thereby the truth of the matters in the bill would not appear and protection on this ground was claimed for them in argument, but of course, see *ante*, p. 189, refused. In *Chartered Bank of India v. Rich*, a common law case, cited *post*, p. 512, protection was claimed partially for such documents as not supporting the opponent's case: but allowed apparently without any reference to this ground.



In illustrating the application of these rules and conditions it is not necessary to consider separately these two classes of documents. These rules and conditions (except those, the subjects of sub-sects. (c) and (d) *post*, which are obviously inapplicable to documents not constituting evidence, and except that, the subject of sub-sect. (b) *post*, which it is conceived unnecessary in the case of documents constituting evidence) are as binding in all respects in the case of the one class as the other.

(a) *As to whether any Description general or individual of the Documents is necessary.*

According to *Bewicke v. Graham, post*, no description at all either of the documents individually or of their general nature (except for the purpose of identification, see *post*, p. 491, and *ante*, p. 227) is necessary. Some reference however seems advisable to other cases on the point. If the doctrines now under consideration were applicable only to documents constituting evidence for the party holding them it might be that the court would require to be satisfied by some description of the documents that they possess that character before accepting the party's statement as to their effect in exclusively evidencing his own title or case: so if there be any distinction between documents constituting and those not constituting evidence for the party, as to which see *ante* and *ante*, p. 482.

*Bewicke v. Graham*, 7 Q. B. D. 400, considered with reference to *Jones v. Monte Video Gas Co.* 5 Q. B. D. 556 and *Taylor v. Batten*, 4 Q. B. D. 85 :—

In *Bewicke v. Graham* protection was extended to documents numbered and tied up in a bundle without any description, but said to relate solely to the defendants' case and not to the plaintiff's case, and not to tend to support it nor to the best of their knowledge information and belief to contain anything impeaching their case.

The decision (Williams, J. diss. in the court below) was rested, see pp. 406, 407, on the ground that there was no distinction between the effect of the statement on oath that documents are irrelevant to the action, and the statement that they relate solely to the party's own case, that *Jones v. Monte Video* had established the conclusiveness of a statement of the first kind, and therefore a statement of the second was equally conclusive, that, pp. 408, 410, the applicant was bound by the affidavit if the documents were sufficiently identified to enable production to be ordered if necessary, that,

pp. 409, 410, 411, 412, *Taylor v. Batten* established this form of description as sufficient for the purpose of identification.\*

The grounds on which the decision was based seem open to the following observations. As regards *Jones v. Monte Video*, although no doubt the decision was to the effect (see this case and the principles there laid down considered, *ante*, p. 214) that the affidavit must be taken as true, it could obviously only be of application to statements therein which could be regarded for this purpose as statements of fact, and the point what were statements of fact for this purpose was never touched upon. It cannot be suggested that a statement as to the effect of a document is a pure statement of fact. And although a statement implied or direct of irrelevancy which in many cases may involve mixed questions of law and fact, see *ante*, pp. 151, 188, must, according to *Jones v. Monte Video*, and according to settled equity practice, be accepted as conclusive (and so also the bare description of a document, see *post*, p. 490, referring to a passage in *Hare*), and therefore may be considered as having been regarded for this purpose as a statement of fact, there has always been recognized in equity the widest distinction of principle between the question whether such and such a document is relevant to the matters in issue, and the question what is the tendency of a document, admitted to be relevant, in its bearing upon those matters: see for instance *Hare*, p. 230: *Mansell v. Feeney*, cited *ante*, p. 483. In particular whereas the onus is on the party seeking inspection to show by the admissions of his adversary that a document is relevant, the onus is on the adversary to show that the admittedly relevant document should be protected from production: see also *ante*, p. 230.

The decision in *Taylor v. Batten*, and more particularly the following passage from the judgment of Cotton, L. J. pp. 87, 88, in that case, lends however considerable authority to the conclusion come to by the court in *Bewicke v. Graham* as to the absence of any necessity for description:—"Then let us see whether further identification is required if there is an objection to produce the documents. We must remember that the plaintiff is bound to take the affidavit as true unless it can be shown that there is some reason on the face of it why it cannot be relied on. The affidavit is sufficient if the documents are sufficiently identified. But it is said that the plaintiffs are entitled to be put in such a position as to test the truth of the affidavit by the description of the documents. That however is in our opinion erroneous. The only (qu. "only," see *ante*, p. 224) object of the affidavit is to enable the court to order the documents to be produced if it think fit to make an order to that effect: and if words are used which if true protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed:" and after observing in reference to *Fortescue v. Fortescue*, cited *post*, p. 490, that a plaintiff would not be entitled to a detailed schedule showing the nature of the defendant's title deeds he says: "the principle of our decision is that the object of the affidavit is to enable the court to make an order for the production of the documents mentioned in it if the court thinks fit so to do, and that a description of the documents which enables production if ordered to be enforced is sufficient:" (see also *ante*, p. 227). The documents the subject of the decision were it may be noted not documents of the kind now being considered, but documents letters and correspondence passing between the party and his legal advisers with a view to his defence, and instructions to and opinions of counsel.

In *A. G. v. Emerson*, 10 Q. B. D. 191, where *Bewicke v. Graham* was referred

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\* It may be noted that it was considered that if necessary the decision might be based upon the discretion conferred upon the court by rule 14. But qu. whether in such a case any discretion could legitimately be exercised after the interpretation put upon that rule in *Bustros v. White*, see *ante*, p. 152.

to, see *post*, p. 491, it should be observed that (p. 197) the form of protection upon which the arguments and judgments were based, was that laid down in *Combe v. Corporation of London* (see *ante*, p. 479), and not, as stated on p. 193 in the report, upon the form in *Bewicke v. Graham*: it was only an assertion in that form that was considered by Brett, L. J. p. 204, to be conclusive, where the court did not see that the nature of the documents had been misconceived: that is to say there would be the party's oath that the documents were such as constituted his evidence: see *ante*, p. 486.

### Other cases and authorities.

In early times in equity the documents would always seem to have been individually described: see for instance *Lazarus v. Morley*, 5 Jur. N. S. 1119. And in many cases, such for instance as *Smith v. Beaufort*, cited *post*, p. 506, *Knight v. Waterford*, cited *post*, p. 507, documents all made the subject of the same assertion were distinguished, production being ordered of some and not of others.

The more recent practice has been (see *ante*, p. 229) to group them or tie them up in bundles with a general description of their nature: see for instance *Owen v. Wynne*, 9 Ch. D. 29: but see *A. G. v. Emerson*, 10 Q. B. D. 191, where a full list seems to have been given: see also *Kettlewell v. Barstow*, *post*, p. 522.

The conclusion arrived at in Wigr. Pl. 318, after investigating the limits within which and the conditions under which the party's oath may be accepted, is that the party must give the court the best means of judging the truth of what he swears to short of that discovery which he desires to withhold, and that a mere general assertion that all the documents in his possession evidence exclusively his own case without describing them might not perhaps in some cases, though in others it clearly would be, sufficient, but that a description of the documents coupled with such an averment would probably in all cases be sufficient unless from the nature of the documents or other circumstances appearing in the answer the court found reason for discrediting the answer, or refusing to give effect to it.

So Mr. Hare in Hare, pp. 230—232 considers that some description of the document is necessary in order to satisfy the court that the evidence is exclusively the party's own, though the description will be assumed to be accurate in point of appellation, as for instance account books, receipts, correspondence with specified persons: and see *ante*, p. 231.

It is not necessary to give a detailed schedule showing the nature of a party's title deeds: Cotton, L. J. in *Taylor v. Batten*, 4 Q. B. D. p. 89, (and see *ante*, p. 231), disapproving *Fortescue v. Fortescue*, contra, if that were the effect of the decision in that case. *Fortescue v. Fortescue*, 34 L. T. 847, was a suit by the wife's heir against the husband's devisee for recovery of land and ascertainment of boundaries. The defendant in her answer stated that the husband died seised of the lands which she believed were conveyed to him by the wife by a deed of such and such a date, parties and effect. On exceptions for not sufficiently setting forth the deed, Hall, V. C. held the answer sufficient, except that she had not answered whether the deed was still in operation or had been revoked. In her affidavit of documents she objected to produce a bundle of deeds . . . relating exclusively to her own title and not relating to the plaintiff's title or tending to support or helping him to make out his case. It was held insufficient, the V. C. being of opinion that an affidavit must be useful, and that a list in which every deed was mentioned must be given: and in particular that the plaintiff's title being a *prima facie* one must have been displaced by some proper assurance, that the plaintiff was entitled to a proper discovery of the instrument which would take away his title, whether it was in the defendant's possession and that a proper list would show that.

Qu. what was meant by a proper discovery of the instrument which would take away his title: (the expression was referred to by Cotton, L. J. in

*Taylor v. Batten*, p. 89, but without comment). Not it is conceived production: see *ante*, pp. 254, 481: but see now as to documents referred to in the pleadings, *ante*, p. 244. Qu. whether anything more was meant than discovery of the fact whether it was in the defendant's possession. But if the plaintiff was not entitled to its production as being exclusively the defendant's evidence, on what ground could he be entitled to know whether or not it was in her possession: see *ante*, pp. 474—476: and see *post*, discussing *A. G. v. Emerson*.

In *A. G. v. Emerson*, 10 Q. B. D. p. 202, Brett, L. J. in reference to *Bewicke v. Graham*, considered that where the party was not satisfied with the particularity of the description of the documents he had a remedy, for he might ask leave either to interrogate or to require a more accurate description of the documents. It is submitted that such a suggestion is founded on a false principle. In order to protect documents admittedly relevant the party withholding them must satisfy the court that they exclusively evidence or relate to his own title or case. What is sufficient to satisfy the court is another question: but unless the court is so satisfied production (or a further affidavit, see *ante*, p. 232) will be ordered. If however the court is satisfied that they are of such a character, it is contrary to principle that interrogatories should be administered inquiring of what they consist or what their nature or contents: see *ante*, p. 475. So far as any description general or individual is necessary in the affidavit it is necessary not for the purpose of discovering to the adversary the nature or contents of the documents: but either for the purpose of identification in order to enable an order for their production to be made if proper, see *ante*, p. 227: or in order to support the claim to protection, see *ante*, p. 230.

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(b) *That they exclusively relate to the Party's own Case or Title.*

This assertion is necessary in the case of documents which do not constitute evidence of his case or title: see *ante*, p. 482.

But it is not necessary in the case of documents constituting evidence of his case or title: see *ante*, p. 479. Nor, it is

conceived, even if as a matter of fact, or if it were shown that, the document did relate to the adversary's case or title, does that entitle the adversary to see it if it is sworn in proper language not to support his case or title: see *Greenwood v. Greenwood*, 6 W. R. 119: *Lloyd v. Purvis*, *ibid.* 421: nor are *Smith v. Beaufort* and other cases, *post*, pp. 506—507, when carefully considered opposed to such a conclusion.

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(c) *That the Document is intended to be or may be used by the Party in Evidence.*

There seems however to be no necessity for this assertion even on the supposition that these doctrines are confined to documents constituting evidence as to which see *ante*, p. 486. In no other case is there any suggestion of its necessity, except in *A. G. v. Emerson*, cited *post*, p. 509, where (see in particular, p. 198) the form laid down by Knight Bruce, V. C. was expressly adopted: see the various cases cited *post*, pp. 494, 504—510.

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(d) *That they form or support the Party's Case or Title.*

There is no distinction of principle between title deeds and any other documents constituting evidence of a party's case or title.

Title deeds constitute evidence of a title of necessity. There are other documents which may or may not constitute evidence according to the circumstances of the particular case.

This is the sole distinction for this purpose between title deeds and any other kind of document. The former must constitute evidence, the latter may or may not. If (see *ante*, p. 486) the doctrines that are now being considered were applicable only to documents constituting evidence, or if there be (see *ante*, p. 482 as to this) any distinction in this respect between a document constituting and not constituting evidence, then once let it be assumed that a document does so constitute evidence and it becomes a proper subject for the application

of the rules under discussion equally with a title deed. No distinction of principle is recognized in Wigr. Pl. 324, or Hare, pp. 194, 195, between a title deed and any other document, such as letters, &c., constituting evidence. In some cases, *Knight v. Waterford*, 2 Y. & C. p. 28, *Firkins v. Lowe*, 13 Pri. p. 198, *Collins v. Gresley*, 2 Y. & J. p. 491, *Neate v. Latimer*, 2 Y. & C. p. 262, *Wilson v. Foster*, M'Cl. & Y. p. 275, they seem to have been regarded as forming an exception out of the general rule requiring production of all relevant documents. Probably it arose from the practice at common law of protecting a witness from producing his title deeds: see *Adams v. Lloyd*, 3 H. & N. pp. 355, 359: *Avery v. Langford*, 21 L. J. Q. B. 217. In Wigr. Pl. 324, the distinction is attributed to mere laxity in applying principles with strictness where the documents were of a less important character.

See further as to title deeds *post*, Part III. of this Chapter, in reference to actions for the recovery of land.

The following documents have been protected or at all events treated as being the party's evidence: bills of exchange or promissory notes: see *Princess of Wales v. Liverpool*, 1 Sw. 114, cited *ante*, p. 248: and *Bolton v. Corp. Liverpool*, *post*, at p. 496, referring to it: and see *ante*, p. 249: but see *Gibson v. Hewett*, cited *post*, p. 544: letters: see *Peile v. Stoddart*, cited *ante*, p. 485: even accounts under some circumstances: see *Bolton v. Corp. Liverpool*, 3 Sim. pp. 475, 477, 479, 489: and see *post*, pp. 495, 496, 506, discussing this case, *Smith v. Beaufort*, *Combe v. City of London*, and *Combe v. Corp. London*: so receipts for moduses: see *Tomlinson v. Lymer*, *post*, p. 508.

Copies or extracts of documents constituting evidence would seem to stand on the same footing as the documents themselves: see for instance *Bolton v. Corp. Liverpool*, 3 Sim. 467: 1 M. & K. 88: *Owen v. Wynn*, 9 Ch. D. p. 30.

(e) *That the Document contains nothing tending to support the Adversary's Case or Title.*

Some negative assertion of this kind is necessary in modern practice: see Lord Selborne in *Minet v. Morgan*, L. R. 8 Ch. p. 365, commenting on the different practice at the date of *Bolton v. Corp. Liverpool* (see as to this *post*, p. 495): and see *ante*, p. 482: but see *Lyell v. Kennedy*, *post*, p. 520, where it was omitted by a defendant in ejectment.

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(f) *That it does not contain anything impeaching his own Case or Title.*

This assertion cannot prudently be omitted (see *post*, p. 498, as to any distinction between a plaintiff and defendant).

It was omitted in *Owen v. Wynn*, *ante*, p. 287: *Kettlewell v. Barstow*, *post*, p. 522: and *Roberts v. Oppenheim*, *post*, p. 504: and see *post*, p. 520, as to actions of ejectment.

So it was omitted by a plaintiff in ejectment in a recent case (not reported) before the C. A. Here, however, the defendant had stated to the court what he expected to find in the documents: and it was held that, the only ground for the application being that the documents would show that the plaintiff had no title, this was in direct contradiction to the proposition laid down as to affirmative support by Mr. Hare, discussed *post*, pp. 496, 497. This decision does not, it is conceived, in any way establish that a plaintiff in ejectment is not bound to make this assertion: it rested on the special facts of the case, the nature of the document and the matter expected to be found therein being known: it is in fact an illustration of the view discussed *post*, p. 497, namely, that mere weaknesses or defects of evidence are not matters impeaching the party's title within the meaning of the above proposition. In all these cases, as pointed out *ante*, pp. 478, 484, the question is not whether a document which in fact exclusively evidences or relates to the party's own case or title is protected, but what unambiguous assertions the court requires the party to make concerning a document of which it knows nothing in order to be satisfied that it contains nothing to help the adversary.

The form actually used in *Minet v. Morgan*, L. R. 8 Ch. 361, which included this assertion was recommended for adoption by the C. A. in *Corp. Hastings v. Ivall*, L. R. 8 Ch. p. 1021: and see *A. G. v. Emerson*, *post*, p. 509, adopting the form of protection laid down in *Combe v. Corp. London*, *ante*, p. 479.

In *Boyd v. Petrie*, 20 L. T. 934, the plaintiffs swore to the effect that the documents related exclusively to their own title and claim and did not support assist or relate to the defendant's case: and it was held that these words did not exclude the possibility that the documents might contain something



impeaching or disproving their title or case and so making out or assisting the defendant's case : for a defendant in such a case (impeaching the transfers to the plaintiffs of certain mortgages) had a right to see everything tending to disprove their title, the defendant's case being that the plaintiffs had no case (see as to any distinction between a plaintiff and defendant, *post*, p. 498).

Where a person departs from settled forms he always comes to the court under a certain amount of suspicion : Selwyn, L. J. *ibid.* p. 904.

See as to the meaning of matter "impeaching" a party's case the references given *post*, p. 497 : and particularly where the documents are his own evidences.

### (1) *The early Practice in Chancery.*

In early times not only was it not necessary to make an assertion of this kind, but it was not even necessary to make any negative assertion (see *ante* (e)) at all, where there were no allegations by the adversary to a contrary effect, in which case of course they must have been met. There was always the denial that thereby the truth of the matters charged would appear to meet the common form of charge to this effect, see *ante*, pp. 486, 487 n. In that state of the practice therefore where there was nothing but a statement to the effect that the documents evidenced the party's own title, and no denial of their containing matter which would impeach or disprove his title or support that of the adversary, there being no counter-charge to that effect by the adversary, the position of the parties in reference to the production of such documents was not entirely satisfactory. It would be a hardship on the party if he were compelled to produce them for his adversary to pick holes in them : see *ante*, p. 476 : also *Smith v. Beaufort*, *post*, p. 506 : and *post*, p. 516 : or to ascertain whether they contained anything tending to disprove his title : see *Combe v. Corp. of London*, 15 L. J. Ch. p. 84 : it would be a hardship on the adversary not to see them if they really contained matter which would assist him : see Wigr. Pl. 306, 307, discussing the difficulty : and see as to the common law practice, *post*, p. 511.

Some observations of Lord Brougham in *Bolton v. Corporation of Liverpool*, a peculiar case of this kind illustrate the difficulty. It was an application (by bill of discovery) on the part of the defendant to an action by a corporation for tolls that the corporation might be ordered to produce documents

sworn by them to evidence their title. Production was refused both in the court below, 3 Sim. 467, and on appeal, 1 M. & K. 88. At p. 92 Lord Brougham says (and see Pearson, J. in *Corp. of Bristol v. Cox*, 26 Ch. D. p. 684, citing it, but qu.): "The plaintiff here (the defendant to the action) does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some defects in that of the corporation. The description of the documents is that they rebut or negative the plaintiff's title: they are the corporation's title not his, and they are only his negatively by failing to prove that of the corporation. He rests on the right which he has in common with all mankind to be exempt from dues and customs: and he says 'prove me liable if you can.' The corporation have certain documents which they swear prove this liability. He cannot call for these documents merely because they may upon inspection be found not to prove his liability, and so to help him and hurt his adversary whose title they are." And, referring to *Princess of Wales v. Liverpool*, 1 Sw. 114, where under special circumstances (see *ante*, p. 248) inspection was granted by Lord Eldon in favour of the defendant of one of two promissory notes on which the action against him was brought, Lord Brougham, p. 93, observes that the thing sought and in substance allowed to be inspected was not any matter collateral but the very instrument on which the plaintiff's title rested, and which could only be the title of the defendant by failing to support that of the plaintiff . . . . and that it could only be of common title by the one party setting it up and the other impeaching it by flaws discoverable by inspection: (see *ante*, p. 244, as to the present practice in respect of documents referred to in the pleadings and *ante*, p. 246, as to the old chancery practice). See further *post*, p. 497, as to this case in connection with the doctrine of "affirmative support": and also *post* (3) as to the onus of proof.

And so in *Combe v. City of London*, 4 Y. & C. 139, a case of a somewhat similar nature, being a bill by the defendant to an action by the city to establish a right to take certain portage fees for discovery and production of various documents disclosed by the plaintiff's answer, the Lord Chief Baron, pp. 158—159, says in reference to documents containing entries of the amounts received by the porters (there being no specific charge of variation as in *Smith v. Beaufort*, see *post*, p. 506): "The constancy of the usage may be a very essential ingredient in support of it and their books must prove the case one way or the other. It is clear therefore that the plaintiff (defendant) has no right to see the books to ascertain whether the defendants (plaintiffs) have charged more or less at different times. That is asking for a discovery of the weaknesses of the adversaries' title and not of the strength of their own." Nor, p. 156, did he consider the defendant entitled to see any documents evidencing the title of the plaintiffs in order to see how long the usage had lasted, although there was an allegation that it had no legal origin, though otherwise, see p. 158, as to documents not being part of their title and showing possibly that at those dates no such right was in existence. The same question was subsequently raised in chancery: *Combe v. Corp. London*, 1 Y. & C. C. C. 631: 15 L. J. Ch. 80 (on appeal): the same claim being made in respect of metage fees, and the defendant filing a bill for discovery and production of the same documents, this time, however, alleging that they would show a variation, see 15 L. J. Ch. p. 84. Knight Bruce, V. C. applying the rule laid down by him and cited *ante*, p. 479, ordered production of them on the ground, p. 651, that as to the charters each of them was shown to contain matter which might be rationally contended to support the plaintiff's case and impeach or weaken that of the corporation (see further *post*, pp. 497—501), and as to the metage and other books that he could find no positive statement anywhere, that they were merely and exclusively (doubting whether they had been properly examined, see as to this *post*, p. 502) evidence for the corporation, or irrelevant to the plaintiff's case (see

as to this last point, *ante*, p. 491). And his decision was affirmed on much the same grounds by Lord Cottenham on appeal.

See further as to *Bolton v. Corp. Liverpool*, *Combe v. City of London*, and *Combe v. Corp. London*, *post*, pp. 506—507.

The necessity, however, which now rests upon the party to make some assertion to the effect that his documents contain nothing impeaching his own case or supporting the adversary's case removes a great part of the difficulty which existed in cases of that character under the practice as it then was: for the addition of an assertion of this kind forms a complete protection on the one hand, while on the other hand if the party omits to make it he cannot as a rule escape production.

But although, this being so, the observations of the judges in the above cases lose much of their force and application they are still of value in considering the meaning of the expression "matters impeaching or disproving the party's own case." To what extent, that is to say, are defects in a party's evidence matter impeaching his case and therefore necessitating the production of the document containing it? (See also *post* as to affirmative support, and *post* (3) as to the onus of proof.) And is there any and what distinction between the obligation of a plaintiff and defendant in this respect? (as to this, see *post* (2)).

As to "affirmative support."

At p. 91, in *Bolton v. Corp. Liverpool*, 1 M. & K. 88, Lord Brougham lays it down that the adversary has a right to the production of documents sustaining his own title affirmatively; and in Hare, pp. 197—199, it is laid down as a general proposition that the adversary's right to discovery of documents which are the evidences of the party is limited to such as affirmatively support his case, but that this proposition does not furnish the basis for a general objection to discovery and is therefore not applicable to other documents (see *ante*, pp. 481—487, as to documents not evidencing the party's own case), otherwise in a case such as *Bolton v. Corp. Liverpool*, where the defendant relied on a defence which no deeds could substantiate affirmatively, namely his right to import goods free of tolls, and where in fact only the evidences of the corporation were protected, certain books of account and tables of duties being produced, he would get no discovery, see pp. 202—203.

It is not, Mr. Hare further says at pp. 197—198, a sufficient ground for discovery to insist that the evidence will prove that the defendant has no title and that the title will therefore devolve upon the plaintiff as a consequence of that failure, citing *Compton v. Grey*, 1 Y. & J. p. 157: (but in this case such a consequence was denied). He also cites in illustration *Roe v. Harvey*, 4 Burr. p. 2487, where Lord Mansfield in reference to ejectment actions said that the plaintiff could not recover but upon the strength of his

own title and could not found his claim on the weakness of the defendant's title, for that the possession gave the defendant a right against every man who could not show a good title, and considers that this is applicable to every suit seeking to change the right and possession of property.\* In cases of that kind the plaintiff is clearly not entitled to discovery which only tends to destroy the defendant's title without affirmatively supporting his own: see *post* (2). But Mr. Hare's general proposition as to affirmative support, unless it is to be understood merely as laying down that mere weaknesses or defects of evidence do not necessitate production of the documents containing them, is difficult to reconcile with *A. G. v. Emerson*, and other cases cited *post*, p. 499. It must be remembered that this was at a time when, see *ante*, p. 495, the practice was in a somewhat unsatisfactory state. See *post* (2) as to the distinction in position between a plaintiff and defendant, and *post* (3) as to the onus of proof.

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(2) *As to the Distinction between a Plaintiff and Defendant in regard to this Assertion* (see *ante* (f), p. 494).

The positions of the plaintiff and defendant in reference to discovery negating their title or case have been considered *ante*, p. 467, in connection with interrogatories. The conclusion there enforced is that, though in some cases, such as *Hoffmann v. Postil*, there cited, the defendant is treated as having a peculiar right to discovery negating the plaintiff's case, either party, the one as much as the other, is bound to give such discovery where it is a material object of the adversary to negative his title or case: but that whereas it is nearly always a defendant's object to destroy or disprove the plaintiff's case, it is not always a material object with the plaintiff to destroy or disprove the defendant's case, as for instance in an action for the recovery of land or other property.

It would follow from this conclusion that except in the cases where the destruction or disproof of the party's title or case is not a material object with the adversary, the adversary is entitled whether plaintiff or defendant to production of documents impeaching the party's own title or case, and the party whether defendant or plaintiff must, if he would

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\* He admits an exception to this doctrine of affirmative support in cases such as *Metcalfe v. Harvey*, and other cases considered *post*, p. 531, where the defendant claiming no title himself but being in the position of a stakeholder alleges that the plaintiff has no title having conveyed it away or otherwise.

protect them, deny that they so impeach it: see further *post*, p. 516, in connection with actions for the recovery of land. The cases support this view. (See also *post* (3) as to the onus of proof: and *ante*, p. 497, as to affirmative support. See as to the exceptional penalty imposed on a plaintiff by rule 15 if he object to produce documents referred to in his pleadings or affidavits although they relate only to his own title, *ante*, p. 245.

**As to the Plaintiff's Obligation.**—In *Corp. Hastings v. Ivall*, L. R. 8 Ch. 1017, a suit by the corporation claiming to be owners of the shore under letters patent from the Crown to restrain the defendant from depositing earth on the beach, the defendant not setting up any title in himself but alleging that the shore was not included in the letters patent and belonged either to the Crown or to A. B., the plaintiffs were ordered to make a further affidavit in the form used in *Minet v. Morgan*, which included a denial of matter impeaching, &c. See also *Minet v. Morgan*, L. R. 8 Ch. 361, where this form was used by a plaintiff claiming a right of common: *Boyd v. Petrie*, cited *ante*, p. 494 (where a distinction was taken in favour of the peculiar right of a defendant to discovery of this nature as to which see *ante*): *Loundes v. Davies* and *O'Connor v. Malone*, cited *post*, pp. 530—531: *Combe v. City of London* and *Combe v. Corp. London*, cited *ante*, p. 496: *Compagnie Financiere, &c. v. Peruvian, &c. Co.* cited *ante*, p. 183: and *Roberts v. Oppenheim*, cited *ante*, p. 494.

**As to the Defendant's Obligation.**—In *A. G. v. Emerson*, 10 Q. B. D. 191, cited *post*, p. 509, it was held by the Court of Appeal, following and approving the rule laid down by Knight Bruce, V. C. in *Combe v. Corp. London* (see *ante*, pp. 478—479), that certain court rolls must be produced by the defendant in spite of a general assertion in accordance with that form (see *ante*, p. 490), and per Brett, L. J. p. 205 (and see Baggallay, L. J. p. 200) on the ground that in a question of disputed boundary, which this was, the existence of entries of admission to a certain extent and the absence of any admissions beyond that extent would on the whole of the court rolls negative or tend to negative the defendant's own case. Anything less like affirmative (see *ante*, p. 497) support it is difficult to imagine. See also *Jenkyns v. Bushby*, cited *post*, p. 508: *Earp v. Lloyd*, cited *post*, p. 508: *Greenwood v. Greenwood*, cited *ante*, p. 486.

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(3) *As to whether the Party on whom the Onus of Proof rests is under any less Obligation.*

See *ante*, p. 497, as to affirmative support: and *ante* (2).

In Wigr. Pl. 367, the view of the learned author seems to be that the party on whom the onus of proof rests enjoys some particular exemption in this respect. Referring to *Bolton v. Corp. Liverpool* (see the judgment cited *ante*,

p. 496), he observes that the onus of proving their case rested on the corporation (the plaintiffs in the action), and that the defendant's case *primâ facie* required no proof and therefore no discovery.\*

Under the old chancery practice this may have been so in the particular case where a defendant put in a pure affirmative plea: for, the charge of possession of documents then necessary to be inserted being of those relating to the matters stated in the bill, and these matters being admitted by the plea, no discovery in support was required: see *ante*, p. 15, n.: and *Clayton v. Winchelsea*, 3 Y. & C. pp. 688—689, pointing out the distinction in this respect between an affirmative and a negative plea. But where plaintiffs claimed as heirs *ex parte maternâ* charging that there was no heir *ex parte paternâ*, the defendant pleading that there was such an heir was held bound to answer the charge of possession of documents relating to the matters stated in the bill or whereby their truth would appear: *Harland v. Emerson*, 3 Sim. 490: 8 Bligh, 62. How far production would have been ordered is of course another question. The decision is criticised in Wigr. Pl. 117 on the ground that the plea of heir *ex parte paternâ* absolved the plaintiffs from any obligation to prove their title, that if the defendant did not prove the truth of his own plea affirmatively the plaintiff would be entitled to a decree whether they were heirs *ex parte maternâ* or not, that their case after plea pleaded was simply a negation of the defendant's plea, that the only ground on which discovery of the documents could be required was that it might assist the plaintiffs in proving that negation but that the bill was not so framed as to entitle the plaintiffs to discovery on that ground, for it had not anticipated the defence and contained no charges applicable to it.

It is not necessary further to consider to what extent the technicalities of pleading in those days operated to deprive a plaintiff in cases of that kind of discovery of documents. Under the present practice the party must give discovery (no charge being necessary as formerly) of documents relating to matters in question in the action; and it is clear that where a defence in the nature of a pure affirmative plea is put in, and this defence is put in issue by the plaintiff the matter of the defence is a matter in question: see further as to this point, *ante*, pp. 12, 35, 464.

Documents therefore relating to the matter so put in question must be included in the affidavit of documents, although of course by proper allegations they may be protected from actual production. For instance, supposing a defence of purchase for value without notice (see as to this defence *post*, p. 537) and issue joined as to the notice, the defendant must make an affidavit of documents relating to the issue of notice just as if there had been under the old practice a charge of possession of documents relating thereto and whereby it would appear that the purchase of the defendant was not a purchase without notice: see *Hardman v. Ellames*, 5 Sim. 640, p. 650: see also *ibid.* 2 M. & K. p. 743: *Macgregor v. E. I. Co.* 2 Sim. 452, discussing the case of a defence of the Statute of Limitations and a charge of possession of documents showing a promise within six years: see also *Parkinson v. Chambers*, 1 K. & J. 72, where an affidavit was ordered, the defence of the statute being however anticipated by a statement that interest had been paid within twenty years: and *Clayton v. Winchelsea*, 3 Y. & C. pp. 688—689: and see *ante*, pp. 37—38.

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\* Qu. as to no discovery even from that point of view: for Shadwell, V. C. at 3 Sim. p. 49, expressly says that if the documents in question had evidenced the defendant's title as well, and which they might have done, production would have been ordered: and see *ante*, p. 497, as to Mr. Hare's views on this case.



That a party must produce documents tending to impeach his case or title where the only defence is a denial of that case or title, and where therefore the onus of proof is on him seems clear. It cannot be that a party is entitled to keep back documents which would disprove or throw doubt upon his case and produce at the trial those documents only which would be evidence in support of his case or prove it without any qualification, merely because the onus of proof is on him and his adversary's case is a simple negation of it: see for instance *Knight v. Waterford*, 2 Y. & C. p. 29, and *Glascott v. Copper Mines Co.* 11 Sim. p. 312. And in fact in *Boyd v. Petrie* and other cases, *ante*, p. 499, it is the plaintiff who is considered to be under a special obligation in this respect.

The point is discussed in Dan. Ch. Pr. pp. 535—536 in reference to the then (1870) practice. The conclusions there come to are not very clearly stated: and qu. whether they are sound even in respect of the practice at that date.

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(g) *The General Assertion* (see *ante*, p. 487) *must be made with Distinctness and Positiveness, with a reasonable and sufficient degree of Positiveness.*

See *Smith v. Beaufort*, cited *post*, p. 506: and in particular *ibid.* 1 Ha. pp. 524—525.

See also Hare, pp. 236—238, explaining *Hardman v. Ellames* (*ante*, p. 254), on the ground of want of positiveness in the assertion.

A denial merely that the documents evidence or relate to the adversary's "title" may in many cases be insufficient. The question is whether they evidence or relate to his case as stated in the pleadings, which cannot always be properly described as his title.

In reference to the plaintiff the term "title" is ambiguous: it may mean his title to relief but it may be used in a narrower sense: see *Felkin v. Herbert*, 30 L. J. Ch. p. 799: *Jenkins v. Bushby*, 35 L. J. Ch. p. 401, cited *post*, p. 508: *Owen v. Wynn*, 9 Ch. D. p. 32, but held sufficient on appeal: *Clegg v. Edmondson*, 22 Beav. p. 157: *Bute v. Glamorganshire Canal Co.* 1 Phill. p. 685.

In reference to the defendant it may be evasive or altogether inappropriate as a description of his case. See *Smith v. Beaufort*, cited *post*, p. 506, where "estate right title of or claimed by &c." was held (see 1 Hare, p. 521: 1 Phill. p. 220) evasive and insufficient: and *Roberts v. Oppenheim*, 26 Ch.



Ap. 728: see also *A. G. v. Corp. London*, 2 M. & G. pp. 265—266, where the defendant claimed protection for documents evidencing his own title, and where Lord Cottenham doubted whether his case, which as pleaded was a mere negative of the plaintiff's title, could properly be called his title.

As to the necessity of the assertion being to the best of the party's knowledge information and belief.

In *Bannatyne v. Leader*, 10 Sim. 230, pp. 235—236 (were however the assertion was only that thereby the truth of the matters stated in the bill would not appear, as to which see *ante*, pp. 482, 487, n.) the V. C. considered that where the question depended on the materiality of the documents with respect to their contents, if the party did not choose to swear positively as he might and would be perfectly justified in doing if he had himself read through the documents and was satisfied in his own mind that they did not contain that which would make out the adversary's case, but merely stated that he believed they would not make it out, that was not sufficient: and in *Combe v. Corp. London*, 15 L. J. Ch. pp. 82—83, Lord Cottenham in reference to the expression "to the best of his knowledge information and belief" agreed that belief was not enough, and affirmed the decision of Knight Bruce, V. C. *post*.

In *Minet v. Morgan*, L. R. 8 Ch. p. 366, Lord Selborne considered that the assertion if made to the best of the party's knowledge information and belief (citing *Adams v. Fisher*, 3 M. & C. 526, where however protection was claimed for the documents as being consequential, see *ante*, pp. 31, 189) was sufficient unless there was something which qualified such a statement, as in *Combe v. Corp. London*, 1 Y. & C. C. C. p. 652, where Knight Bruce, V. C. was unable to find an averment that any person who had examined the books had positively stated or could positively state that their whole contents exclusively evidenced the corporation's case or were irrelevant to the plaintiff's case, and generally inferred that the examination had not been precise and complete: or which showed substantial insufficiency on the face of the affidavit.

So in *Peile v. Stoddart*, 1 M. & G. 192, p. 195, approved in *Minet v. Morgan*, it was held sufficient for a party to state that he was advised and believed: and a distinction was taken between "being advised and believing" and "being advised and therefore believing." And in *Manby v. Bewicke*, 8 D. G. M. & G. p. 479, where the parties made an assertion in the fullest form but, as they expressly stated, only on information received from their solicitors (though they added that to the best of their knowledge information and belief it was the fact), it was said that a statement made entirely on the faith of information received from other persons was not sufficient, and *Peile v. Stoddart* was distinguished on the ground that there the party appeared to have examined the documents himself. So in *Balguy v. Broadhurst*, 1 Sim. N. S. 111, it was not considered enough for a party to say that he was advised and insisted that certain documents, without describing them, were confidential communications. So in *Pepper v. Chambers*, 7 Ex. Rep. 226, an affidavit supporting an application for inspection was held insufficient as stating merely that the party was advised that the documents might be required as evidence for him without stating that he believed the advice to be well founded.

"As we are advised and say" was considered sufficient in *Kettlewell v. Barstow*, L. R. 7 Ch. 687, in reference to the relevancy of certain documents to a particular issue.

"I am informed" was said to be equivalent to "I believe" in *Woodhatch v. Freeland*, 11 W. R. 396: (and see *ante*, p. 127): but qu.

The upshot then of these authorities is that the party must make his statements "according to the best of his knowledge

information and belief" or in some form equivalent thereto. But they do not decide what personal inspection or examination, if any, by the party himself is necessary.

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(h) *Where the General Assertion (see ante, p. 501) will not be accepted.*

The court may refuse to give effect to the general assertion either on account of the nature of the action, or of the documents, or generally by reason of matter appearing in certain sources, such sources being, it is conceived, the same as those into which the court may look for the purpose of testing the sufficiency of an affidavit of documents: see *ante*, p. 215.

In order to justify the court in disregarding the party's assertion to this effect (the form laid down by Knight Bruce, V. C. in the passage cited *ante*, p. 479) the court must be reasonably satisfied or reasonably certain (and see *ante*, p. 181, as to the distinction between making an order for a further affidavit of documents, which may be done on mere suspicion, and an order for the production of alleged irrelevant documents, or, *ante*, p. 109, for a further answer to an interrogatory, but see also the distinction pointed out *ante*, p. 230, between the case of a party seeking to protect admittedly relevant documents and an assertion of irrelevancy), pp. 198, 204, 206, from other admissions of the party, by the description of the documents given by him or from other admissions or from other documents produced to the court, p. 204 (but see the sources *ante*), that their nature, that is their nature as described by the party in his general assertion, has been erroneously represented or misconceived, and per Brett, M. R. p. 205, where the documents are of such a character that the party cannot properly make such an assertion the court cannot accept the affidavit as satisfactory: *A. G. v. Emerson*, 10 Q. B. D. 191, following and amplifying the propositions laid

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down by Knight Bruce, V. C. *ante*, p. 479, and ordering production, see *post*, p. 509. In *Roberts v. Oppenheim*, 26 Ch. D. 724,\* this case was cited to show that the plaintiffs might have misunderstood the effect of the documents: Cotton, L. J. at p. 734, said: "As I understand that case the court held that there was protection, unless the court was satisfied that the effect of the documents was misconceived. In that case there were court rolls extending over many years, and the court was able to see from the nature of the questions in the action, and of the documents, that the effect of the documents was misunderstood. So far that case is an authority. But I think that we ought not to speculate in order to get rid of the protection claimed, and that we ought to accept the affidavit as conclusive, unless the court can see distinctly that the oath of the party cannot be relied on. So far as I can see, there is nothing in this case to show that: and to say in an ordinary case that the court cannot rely on the affidavit of a party would be practically to take away the right of a plaintiff or defendant to claim protection for any deed." See also *Ponsonby v. Hartley*, *post*, p. 509: and the cases *post*, p. 507.

So in Wigr. Pl. 318, the learned author considered, that the general assertion would be accepted unless from the nature of the documents or other circumstances appearing in the answer the court found reasons for discrediting it or refusing to give effect to it. So in *Greenwood v. Greenwood*, 6 W. R. 119, Kindersley, V. C., considering that the assertion should be disregarded if from the description of the documents or the nature of the action or the whole together the court thought they had been misrepresented, ordered production of certain documents in accordance with these views. The mere use of the word title the mere allegation that the documents relate exclusively to the defendant's title is of no avail to the defendant in resisting the production, if that conclusion be opposed to the obvious character of the documents, or if it be not supported by specific averments excluding all probability that the documents would furnish evidence in support of the plaintiff's case: *Harris v. Harris*, 4 Ha. p. 184.

In *Bulman v. Young*, 31 W. R. 766, protection was claimed and allowed for the copy of an extract from a confidential (see as to this *ante*, p. 302) letter from a person not a party to the action to a director of the defendant

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\* See this case also cited *ante*, p. 244: plaintiffs claimed protection, as relating only to their own title, &c., for deeds through which in their claim they deduced title to a forecourt: defendants set up no title, but alleged it to be public property: it was not a question of disputed boundary, see p. 729, and *post*, p. 508.

company as relating solely to their own case, &c. . . . in the form used in *Bewicke v. Graham*, for there was nothing to show from the affidavit or from the nature of the document that it was material or had anything to do with the question at issue as in *A. G. v. Emerson*. The terms in which the grounds of this decision are stated are open to criticism. The document was included in the affidavit of documents and must therefore be assumed to be relevant or material to the matters in question, see *ante*, p. 190: the real question was whether the defendants had shown that a document which they had admitted to relate to the matters in question was within the rule protecting a document relating exclusively to the party's own case, &c. . . . and whether their assertion to that effect could be accepted.

All counter allegations inconsistent with the general assertion made by the adversary whether in his pleadings or by way of interrogatories must be specifically and not merely generally met: see *ante*, p. 259. If they are specifically and satisfactorily met the party may claim protection for the documents as exclusively evidencing or relating to his case or title in the proper form. And the adversary is in no better position by making specific charges of this kind if they are so met: otherwise such charges would always be made whether there was any foundation for them or not in order to deprive the party of the power of protecting his documents: see *ante*, pp. 256—257: *Smith v. Beaufort*, *post*, p. 507: and generally *ante*, pp. 257—261.

In *Stroud v. Deacon*, 1 Ves. 37, the bill charged that by producing a certain deed it would appear that the title of the person under whom the defendant claimed was only for her life, and it was held that some answer must be given to the charge, though it did not follow that the document must be produced.

Where the defendant to a bill for redemption alleges that he is absolute owner and not mortgagee of the property in question, and the plaintiff has alleged that the defendant is in possession of a certain deed containing a proviso for redemption of the property, the defendant must either deny having the deed in his possession or that it contained such a proviso. In the latter case there would then be ground for the defendant to go upon in insisting that it was the evidence of his own title and not of the plaintiff's. But without meeting the charge it would not be enough to make such a general assertion: see *Duncombe v. Davies*, 1 Ha. p. 190.

"If the defendant pleads a deed which constitutes his title he cannot be compelled to produce it because it is his own title and not that of the plaintiff, but, if the plaintiff alleges that that deed contains something which would show or support his title, the defendant is bound to answer an interrogatory founded on that allegation, because although the deed is part of the defendant's title it may be the most important part of the evidence of the plaintiff who may find in it a recognition of that which if true would supersede the title set up by the instrument itself": Lord Cottenham in *A. G. v. Corp. London*, 2 M. & G. p. 260. "Although a defendant will not be compelled to produce a document which is the evidence of his title yet if he intends to avail himself of that protection he is bound to negative that which the bill alleges such a document to contain so far as it would be evidence of

the title of the plaintiff. The reason is that, whether it be something to be found in the document itself or to be inferred from the absence of it in the document, the circumstance alleged is alleged not for the purpose of investigating what the defendant may have to show in proof of his title but for the purpose of establishing or strengthening the plaintiff's title or repelling that which he expects to be set up against him, all of which are legitimate objects of discovery": *ibid.* p. 261.

The following cases are instances in which a party's general assertion has not been accepted by the court:—(see the particular class of cases of disputed boundary or parcels cited *post*, p. 508 to p. 510)

In *Smith v. Beaufort*, 1 Ha. 507: (on app.) 1 Ph. 209: the defendant to an action for customs and tolls filed a bill of discovery in aid of his defence alleging among other things variations in the payments, and charged in the usual form possession of documents relating to the matters stated in the bill whereby their truth would appear. The answer admitted the alleged variations but explained them: and also admitted the possession of documents relating to the matters charged, denied that thereby their truth would be elucidated except as in the answer mentioned, and said in effect that they were his title deeds evidences and muniments, that they evidenced or related to his own right and title and not to any estate right or title of or claimed by the plaintiff &c. . . . Production was ordered on the same grounds both by Wigram, V. C. in the court below and by Lord Cottenham on appeal, namely that the variations were not denied but admitted and explained (compare *Cannock v. Jauncey*, cited *ante*, p. 262, and *Harris v. Harris*, *post*, p. 507), that the documents were admitted to relate to these variations, that as to the denial that they evidenced any estate right or title of the plaintiff he did not claim any estate right or title (see as to this *ante*, p. 501), that as to the assertion that they evidenced or (see *ante*, p. 487) related to his own title the point was that they also related to the plaintiff's case charged in the bill, that (1 Ha. p. 520) they were not exclusively relevant to his own title, that (1 Ph. pp. 220, 221) they did not exclusively evidence it but showed the alleged variations and thereby tended to disprove it: (see *ante*, p. 491, as to exclusive relevancy where the documents constitute evidence).

Both in the court below and on appeal, *Bolton v. Corp. Liverpool* (discussed *ante*, pp. 495—496) was distinguished on the ground that (1 Ph. p. 221) the documents in that case exclusively evidenced the corporation's title, for, citing the judgment of Shadwell, V. C. 3 Sim. p. 490, nothing was to be inferred from their answer that they evidenced the adversary's title which they might also do, and, per Wigram, V. C. p. 522, that there was a mere general allegation that the documents of the corporation would show that their case was unfounded, that is that their production would furnish evidence against themselves, that this general allegation was denied, that the documents related exclusively to their own title (they were described as evidencing and showing their own title to the dues and customs) and that where a defendant credibly denied the allegation upon which the plaintiff founded his right to a production of the documents relating exclusively to the defendant's case the plaintiff had no right to call for an inspection of them merely to see whether he could discover something which might invalidate the defendant's case.

In *Combe v. City of London*, cited *ante*, p. 496, there was it seems no charge of variation though so said in *Smith v. Beaufort*, 1 Ph. p. 217: in *Combe v. Corp. of London*, cited *ante*, p. 496, there was a charge that the documents would show a variation, and Lord Cottenham at 15 L. J. Ch. pp. 83—84 says that in *Bolton v. Corp. Liverpool*, the ground was that the documents were required merely to ascertain whether they contained anything to disprove

the corporation's title (see *ante*, p. 495), and not as in the case before him to prove facts alleged affirmatively (see *ante*, p. 497) namely that there was a variation, and which were not positively denied.

In *Smith v. Beaufort*, 1 Ha. pp. 522—524, Wigram, V. C. points out that the important difference in the two cases was not that in the one a definite allegation was made and in the other only a general allegation, but lay in the manner in which the allegation was met, for that, see *ante*, p. 505, a party was in no better position because he alleged a specific defect and made it his own case if the allegation was precisely denied, and that if in the case before him it had been denied with due precision that any such variance as specifically charged appeared in any of the documents, he might have protected himself.

In *Gresley v. Mousley*, 2 K. & J. 288, a suit brought by the devisee and heir-at-law of A. against the devisees in trust and executors of A.'s solicitor to set aside a purchase made by the solicitor from A. on the ground of undervalue and of A.'s having been then in embarrassed circumstances, the defendants were ordered to produce, besides confidential communications between solicitor and client, documents of title and other documents relating to the property including copies of conveyances of parts of the property to purchasers from the solicitor, mortgages made by A., and a valuation of the property: for although the defendants denied any fraud and said that the documents related to the property purchased by the solicitor and his title as such purchaser exclusively and did not relate to or concern or make out the plaintiff's title, the nature of the plaintiff's case and the description of the documents in the schedule showed that some of them (for instance the copies of conveyances would show the prices) must contain important evidence for the plaintiff, following *Smith v. Beaufort*.

In *Harris v. Harris*, 4 Ha. 179, a suit by the personal representative of a deceased person for a declaration of partnership and for an account, the defendant denied the partnership and said that his documents related exclusively to his own title and his own affairs and business in which the deceased had no interest and did not relate to any partnership or business in conjunction with the deceased: but he admitted (compare *Smith v. Beaufort*, *ante*, p. 506) that the joint name had been used. Wigram, V. C. ordered production considering that in a case of that character the court must exercise its own judgment as to the effect which the evidence might have, and that consistently with the answer every entry in the documents might be in the joint name, and that these entries would be evidence for a jury. See also *Mansell v. Feeney*, 2 J. & H. 313, 320: a somewhat similar case, the defendant alleging that the plaintiff's interest was that of a lender only, and where production of the business documents was ordered in spite of the defendant's denial that the plaintiff's name appeared therein except as a customer: see *ante*, pp. 188, 483, citing Lord Hatherley's judgment. See also *Somerville v. Mackay*, 16 Ves. 382. In *Ferrier v. Atwood*, 12 Jur. N. S. 365, a suit to establish a partnership, the defendant alleged that the partnership terminated in a particular year: he was ordered to produce the business books and other documents though he swore that they related exclusively to his own business and contained no entries supporting or tending to support the plaintiff's case; for the nature of the dispute was considered to render it impossible to bind the plaintiff by the defendant's view of the nature of the documents, and it was reasonably possible that they might assist the plaintiff's case.

See *Riccard v. Inclosure Commissioners*, 4 E. & B. 329, a feigned issue to determine whether the plaintiff had any interest in a manor, where production of leases was ordered, the court considering that they might help the defendant's case in spite of the plaintiff's assertion that they were his title deeds and did not relate to and would not prove the defendant's case: but see *post*, p. 511.

In *Knight v. Waterford*, 2 Y. & C. 22, an action by a rector to recover tithes against a person who was both patron of the rectory and lord of the manor in which the tithes claimed were situate, the plaintiff alleged that the



customary payment of a composition relied on by the defendant was founded on a series of corrupt contracts. The defendant claimed protection for all his documents (which were specified in the schedule) as relating to his and not the plaintiff's title. Production was ordered of all the documents which could be considered to refer to these contracts, also of a map for the purpose of showing the extent of land subject to the tithes, and of the court rolls under the circumstances, but not of documents being the evidence of his title to the inheritance of the manor land or tithes which could not help the plaintiff's case. "The mere opinion (per Lord Abinger, p. 29 and see p. 41) of the defendant that the documents do not relate to the plaintiff's title cannot alter the case, because it is quite clear they do relate to his title if they have relation to the tithes at all."

In *Firkins v. Lowe*, 13 Pri. 193, somewhat similar to *Smith v. Beaufort*, *ante*, the defendant to an action to recover tithes applied by bill of discovery for inspection of certain vicar's books in order to support his defence of a modus. Production was ordered of entries in these books which were admitted to relate to the payment of the sum set up as a modus, the court refusing to accept the party's own construction of them that they were of importance to and evidence for himself and not for the adversary, and that he had no concern in them. In *Bligh v. Berson*, 7 Pri. 205, the plaintiff in a suit for tithes was refused inspection of vicar's books as being part of the defendant's evidence, and there being no sufficient admission that they contained evidence in the plaintiff's favour though they might have done so. In *Tomlinson v. Lymer*, 2 Sim. 489, receipts for moduses described as evidence for the defendant were protected: and in *Tomlinson v. Booth*, 4 Sim. 461, all documents showing the existence of a modus.

In matters of disputed boundary, or where the question has been whether particular property was comprised in a particular deed, or in questions of identity of parcels, the general assertion has been disregarded, and inspection of the parcels in title deeds, and of other documents has been ordered, though see an old case of *Hungerford v. Goring*, 2 Vern. 38, a bill by one landowner against an adjoining landowner to discover boundaries, to which a demurrer was allowed.

See *Roberts v. Oppenheim*, *ante*, p. 504, n.

In *Lind v. Isle of Wight Ferry Co.* 8 W. R. 540, a suit to recover lands charged to have been taken possession of by the company though not included in the notice to treat, and therefore in the nature of an ejectment action in which the plaintiff had to make out his title, the defendants alleging that it was Crown property were held entitled to see the parts of the plaintiff's documents relating to the parcels of the lands (but not the other parts, for they were not entitled to pry into the flaws and defects of his title) though the general claim to protection was sufficiently stated.

In *Jenkins v. Bushby*, 35 L. J. Ch. 400, where the question in dispute was the right to work mines, the defendant claiming that the land was part of the common of a manor of which he was lord was ordered to allow inspection of the parcels in his deeds, for though they might not show the title to the land they might show enough to show that the land was not part of the common; the terms of his claim to protection were it might be noted (see *ante*, p. 501) somewhat ambiguous. See also *Bute v. Glamorganshire Canal Co.* 1 Phil. 681, a case involving a question of disputed boundary, where production of leases and maps were ordered, and where also the claim to protection was insufficiently stated, see *ante*, p. 501.



*A. G. v. Emerson*, 10 Q. B. D. 191, cited *ante*, pp. 489—491, was an information (by the Crown on the revenue side and therefore by O. 68 excepted from the rules of the Jud. Act) claiming a declaration of the title of the Crown to a certain foreshore, and if necessary a commission to ascertain boundaries: the defendant claimed to be entitled to it as lord of the manor. Production of certain court rolls was ordered, although he had (or for the purpose of the judgment was assumed to have) claimed protection for them in accordance with the form laid down (see *ante*, p. 479) in *Combe v. Corporation of London*, the court refusing on the grounds stated *ante*, pp. 503, 504, to accept his description of them. He had made certain disclosures in answer to interrogatories which to some extent affected the question.

In *Ponsonby v. Hartley*, W. N. 83, pp. 13, 44, an action by the lord of a manor against the owner of enfranchised lands to restrain him from working a mine, Pearson, J. held that as the

### 508. To precede "*Roberts v. Oppenheim*."

In a recent case in the Court of Appeal (*Marsh v. Bailey*, not reported) all these cases of disputed boundary were referred to and the question discussed, but no decision was given. Counsel for the party claiming protection pointed out that in none of the cases (except *A. G. v. Emerson*) was there any assertion that the documents contained nothing impeaching the party's case, and argued that where such an assertion was made inspection should be refused.

In a recent case *Marsh v. Bailey*, 78 L. T. p. 262, Pearson, J. considered that there was a distinction between maps and deeds, for the true meaning of deeds is disputable or easily mistaken, but the purport of maps is clear and unmistakable, and refused inspection of the maps: but *qu.*: see, for instance, *Earp v. Lloyd*, *post*.

to the mines, and that none of them showed a right title or interest in the plaintiff or the truth of his allegations: for (p. 553) the deeds which evidenced the defendant's title might afford the strongest negative evidence to show that there was no such identity, referring to *Burrell v. Nicholson*, cited *post*, and *Smith v. Beaufort*, cited *ante*, p. 506, as instances of discovery being granted to negative or disprove the adversary's case (see as to this *ante*, p. 499).

In *Burrell v. Nicholson*, 1 M. & K. 680, a bill for discovery in aid of an action of trespass for entering to distrain for rates, the question being whether the plaintiff's house was in the parish or not, he was allowed (having failed to obtain inspection at common law, 3 B. & A. 649, on the ground that as he denied being a parishioner he could not see the parish books, see *ante*, p. 283) to inspect parish books and other documents, the question being one of boundary and the documents containing admittedly evidence common to both parties, evidence of the title of each.

In *A. G. v. Thompson*, 8 Ha. 104, an information for working mines, where the question was whether certain property (under which the mines lay) of which the defendant was in possession belonged to him in fee or only as leasehold under a lease of which the plaintiffs were reversioners,

the defendant admitted that he derived title under a person whom the plaintiff alleged to be lessee only, and that the parcels in the deed under which he claimed, in some respects though not wholly, corresponded with the parcels in the lease to such lessee; the plaintiffs were held entitled to inspect the parcels in that deed, for they would be material to show the identity, though the defendant had sworn that his documents were his own title deeds, exclusively related to his own title, and did not tend to prove any of the allegations in the bill.

So in *A. G. v. Lambe*, 11 Beav. 213: 17 L. J. Ch. 154 (see also *ibid.* 3 Y. & C. 162, cited *ante*, p. 277) where the question was whether certain waste lands belonged absolutely to the defendant or whether he was only tenant in common thereof with the Prince of Wales, and it turned upon the point whether they were included in a conveyance to him by T. of certain manorial rights of which T. was tenant in common with the Prince of Wales, production was ordered on the ground that, though the terms in which he had claimed protection for it were in themselves sufficient, still under the circumstances it might contain (see p. 219) matters very material to the plaintiff's case.

See *Egremont Burial Board v. Egremont, &c. Co.* *ante*, p. 160.

In a common law action of ejectment, *Doe d. Avery v. Langford*, 21 L. J. Q. B. 216, the reversioner of a lease bringing ejectment for property charged to be comprised in a lease then expired was allowed to inspect the lease (on affidavit of no copy according to the old common law practice, see *ante*, p. 265), and of the assignment thereof to the defendant, but not of a conveyance to him of freeholds, though otherwise if the defendant had admitted the plaintiff's assertion that the property if not comprised in the conveyance must have been comprised in the lease, and the only question was in which it was comprised (see p. 218).

Where the plaintiff was entitled to a legacy charged upon property belonging to the testator not in settlement, the defendant, claiming that the testator was tenant in tail of certain estates but not specifying which, and admitting that he had in his possession a copy of the deed creating the entail, but asserting that it made out his own title and did not tend to show any title in the plaintiff, was ordered to produce it, for it would show what lands were and what were not in settlement: *Hercy v. Ferrers*, 4 Beav. 97.

But where legatees claimed a charge on the testator's real estate and obtained a decree for an account, and subsequently filed a bill for discovery and production of deeds against a person claiming as tenant in tail, a demurrer to setting forth the deeds under which the defendant alleged the testator was tenant in tail was allowed, though it was argued that the production would show what estates were in settlement and what were not: *Wilson v. Forster*, Y. 280: and see *ibid.* M'L. & Y. 274, where also production was refused, *ante*, p. 481.

In *Potts v. Adair*, 3 Sw. 268 n, a suit by a vicar against a person in possession of part of the glebe alleging confusion of boundaries and praying a commission, he was allowed to inspect maps and plans referred to by the defendant in his answer.

A demurrer by overholding tenants under expired underleases to a bill of discovery by the reversioner of the original lease alleging that all the parcels comprised in the lease had not been surrendered and that by reason of lapse of time it was difficult to ascertain the parcels and charging possession of documents which would show it, was overruled independently of the particular relation of lessor and lessee (as to which see *ante*, p. 279): *Brown v. Wales*, L. R. 15 Eq. 142.

An heir at law, where the boundaries were confused so that he could not bring ejectment, could file a bill to know what were the farms and who were in possession: *Loker v. Rolle*, 3 Ves. 4.

IV. *The old Common Law Practice.*

In the common law courts the practice under the C. L. P. Acts (see as to the practice under the common law equitable jurisdiction and *profert and oyer*, *ante*, p. 263) differed considerably from the equity practice. It was not the custom, either under 14 & 15 Vict. c. 99, s. 6, which gave the power of ordering inspection, see *ante*, p. 156, nor under the C. L. P. Act, 1854, s. 50, which introduced the practice of the affidavit of documents, see *ante*, p. 156, to claim protection in any particular form; nor did the court give the same conclusive effect to any assertions which the party made as to his own documents: see for instance *London Gas Light Co. v. Chelsea*, cited *post*, p. 514: and see *ante*, p. 155. On an application for inspection under the first act the applicant must file an affidavit, and make therein such statements as that it might appear to the judge that the documents were asked for for the purpose of enabling the applicant to support his case and not to find a flaw in the opponent's case; and the party might file an affidavit in reply to the effect that they related exclusively to his own case: *Hunt v. Hewitt*, 7 Exch. 236.

Inspection would not be ordered simply to enable the applicant to see whether there was any weakness or to pick holes in his opponent's case: *Chartered Bank of India v. Rich*, 4 B. & S. p. 81: *Wright v. Morrey*, 11 Exch. 209: *Hunt v. Hewitt*, 7 Exch. p. 244: *Scott v. Walker*, 2 E. & B. p. 563: *Galsworthy v. Norman*, 21 L. J. Q. B. p. 70: or to enable him to make out a case: *Chartered Bank of India v. Rich*: or in the nature of a fishing application: *Scott v. Walker*, p. 560: or to see whether a case could be made out against him: *Mangino v. Schneider*, 7 Exch. p. 231. Where therefore the applicant's affidavit was vague, inspection was refused: see *Mangino v. Schneider*: *Wright v. Morrey*: *Pepper v. Chambers*, all cited *post*, p. 514: (see *ante*, p. 495, as to the difficulty under the early chancery practice). Discovery was legitimate to establish the plaintiff's original case or to enable him to answer the defendant's case: Crompton, J. in *Scott v. Walker*, 2 E. & B. p. 563: and see Coleridge, J. *ibid.* p. 561: *Wooley v. Pole*, 14 C. B. N. S. p. 541.

See as to any distinction between a document constituting evidence for the part and one not constituting evidence: *Hunt v. Hewitt*, *post*: (in chancery see *ante*, p. 482).

The principles laid down in *Hunt v. Hewitt* were subsequently approved as those which should guide the court in ordering inspection whether under that act or the C. L. P. Act, 1854: see *Chartered Bank of India v. Rich*, pp. 80—81, 82—83.

In the last-mentioned case, pp. 82—83, Blackburn, J. considered that the court had not merely a ministerial duty to order inspection of all documents scheduled as relevant in the affidavit made under sect. 50 of the act unless privileged, as might be the practice in equity (see *ante*, pp. 154—155), but to do what was just between the parties and to see whether the documents were such as would tend to elucidate facts material to the applicant's case (as to there being legal evidence see *ante*, p. 184): and see *Houghton v. London and County Assurance Co.* 17 C. B. N. S. p. 83.

So Cockburn, J. in the same case, p. 80, considered that the court was not bound by the denial of the party that the documents related to the applicant's case but would protect them if it could collect from the materials before it that though relating to the matters in dispute they were not relevant in the sense of tending to establish the applicant's case.\*

Books and other business documents were allowed to be inspected in the following cases: but the inspection would be limited to particular documents or parts of them: no general liberty to ransack them would be given.

In *Hunt v. Hewitt*, 7 Exch. 236, an action by an architect for commissions on superintending the erection of buildings for the defendant, the latter alleging in his affidavit denial that the work was done, exorbitant charges, credit given to another person, was held entitled to inspect the plaintiff's journal or day book in order to see whether there were any entries relating to the work and the prices charged therefor, though the plaintiff denied that

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\* In this case (also cited *ante*, p. 420) the documents in question passed in the course of collecting evidence or information for the solicitor, and they were described as specifying the evidence which could be given and as in no way material to or supporting the defendant's case: see as to such documents and the application to them of the test of not supporting the adversary's case, *ante*, p. 487.

they would furnish material evidence in support of the defendant's case, or in effect show the truth of the allegations in his affidavit, the defendant's case was of a negative character (p. 245), and he did not seek to know the evidence by which the plaintiff supported his case, for the books would not be evidence for the plaintiff: (see as to any distinction between documents which are and documents which are not evidence for the party, *ante*, p. 512).

In *Scott v. Walker*, 2 E. & B. 555, an action to recover a deed on which the defendant an attorney claimed a lien for work done, the plaintiff alleging in his affidavit that the defendant's ledgers and journals would show that the work was done for another person and not for himself was allowed to inspect entries relating to the particulars of the lien but not the rest of the books: Erle, C. J. considering that the inspection should be limited to specified entries (p. 562). In *Galsworthy v. Norman*, 21 L. J. Q. B. 70, the attorney bringing the action for work and labour done, and the defendant alleging that the work was done for another person, inspection of the plaintiff's documents relating to this question was allowed.

In actions for goods sold and delivered the plaintiff would be allowed inspection of the defendant's books (of specified entries: Erle, C. J. p. 562) in which he believed the articles were entered to his credit: *Scott v. Walker*, p. 563.

In *Rayner v. Allhusen*, 21 L. J. Q. B. 68, an action for the price of goods, the defendant was allowed inspection of bought and sold notes, invoices, memoranda, books and other documents containing any entries relating to dealings between the plaintiff and a third party whom the defendant alleged he had paid for the goods and between the two parties.

A defendant to an action for goods sold and delivered claiming as a set-off commission on persons introduced by him was allowed to inspect portions of the plaintiff's ledgers, the latter being at liberty to seal up such parts as he should swear the defendant had no concern with: *Bull v. Clarke*, 15 C. B. N. S. 851.

In actions for wrongful dismissal the plaintiff was allowed to inspect minutes and entries in his late employer's books and writings relating to his employment with liberty to the defendant to close up the other parts: *Hill v. G. W. R. Co.* 10 C. B. N. S. 148: *Houghton v. London and County Assurance Co.* 17 C. B. N. S. 80.

In *British Empire, &c. Co. v. Somes*, 5 W. R. 489, an action to recover the excess on a bill paid under pressure in respect of repairs to a ship on the ground of overcharge, all inspection of the defendant's books showing the amount and particulars of labour, work and materials was refused by the common law judge, but afterwards, on a bill for discovery being filed in aid of an arbitration on the same matters, 5 W. R. 813, inspection was allowed of the returns as to labour done and materials used, but not the prices paid for the labour; for there was nothing to show what had been done by way of repairs, it not being like the case of building a ship to which the rule of quantum meruit would apply.

See *ante*, p. 293, as to inspection by shareholders of the books of the company.

**Actions for Libel.**—It was considered that a person who ventured to publish a libel or slander should be in a position to justify his conduct and not come to the court to ask for assistance to get up some proof, and in particular if the person libelled was a merchant or a company the defendant would not be allowed to search the books of business of the merchant or the company for this purpose: *Metropolitan, &c. Co. v. Hawkins*, 4 H. & N. 146, pp. 150, 151, where the defendant (a shareholder but regarded as a stranger *quâ* this application: *qu.* whether he could have got inspection by mandamus, *ibid.* p. 148: and see *ante*, p. 291) was held not entitled to inspection of the minute book, cash books, journals, ledgers and other books containing entries relating to the business during a particular period, in order to support a plea of justification to a libel imputing insolvency to the company. See also *Gourley v. Plimsoll*, *ante*, p. 463. See as to inspection by plaintiffs in actions

for libel, *ante*, pp. 320, 347, in connection with the subject of criminatory discovery. In *Collins v. Yates*, 27 L. J. Ex. 150, an action of libel for imputing dishonesty to the plaintiff while in the defendant's employment, the plaintiff was allowed to inspect accounts, entries in books, and letters relating to his employment for the purpose of disproving the defence of justification, the inspection to be confined to the particular acts of dishonesty charged, but in the event of no particulars being given, to be general.

In an action against the keeper of a licensed lunatic asylum for improper treatment of a patient, the latter was allowed to inspect the books of admission, entries of removal and discharge of the plaintiff, medical visitation book, visitors' book, patients' book, licenses, orders and medical certificates and letters from the Commissioners of Lunacy relating to the plaintiff: *Hill v. Philp*, 7 Exch. 232. Similar inspection was allowed in *Stilwell v. Ruck*, 4 H. & N. 468, an action by the keeper to recover expenses from a patient.

### Other cases :—

In the following cases inspection was refused on the ground that the applicant's affidavit (14 & 15 Vict. c. 99, s. 6) was too vague and did not sufficiently show the necessity or materiality of the inspection for or to his case (see *ante*, p. 511):—in *Mangino v. Schneider*, 7 Exch. 229, an action by a stockbroker in respect of the purchase of stock, of his books, of certain bonds, and of other documents: in *Pepper v. Chambers*, *ibid.* 226, an action to recover for services rendered to the defendant company, of the company's books: in *Wright v. Morrey*, 11 Exch. 209, an action for money lent to the defendant's wife deceased, of the plaintiff's account book to see whether the loan was made before or after marriage.

In *Colman v. Truman*, 3 H. & N. 871, an action for breach of contract in not accepting goods, the defendant in support of his defence alleging fraud was allowed to inspect correspondence between the plaintiff and consignors and brokers after the contract and the alleged breach, though said to in nowise tend to prove or support the defence.

In *Woolley v. Pole*, 14 C. B. N. S. 538, an action by the insured in respect of loss of furniture by fire, and where the defendants imputed fraud to the plaintiff both as to the fire and the articles alleged to have been burnt, the defendants were ordered to produce all communications between themselves and their agents with whom the insurance had been effected, and also between themselves or their agents and another insurance office with which the furniture had also been insured relating to the existence of the property and its value, but not (and see *ante*, p. 417) reports and lists of salvage made by the surveyor after action brought for the directors' information and the attorney's use in preparing the defence, and as to the lists, being a portion of their evidence, for the plaintiff had no right to look into the defendants' brief.

In an action to recover the price of gas, the defence being that it was defective in quantity and quality, the defendants were ordered to produce documents containing the results of experiments and observations made by them on the gas, for they were not made with any particular reference to this litigation, that is, were not in the nature of proofs (p. 424), and, though the defendants had sworn to the effect that they related exclusively to their own case and would disclose the manner in which the plaintiffs' case would be disproved and their own case established, it was sworn on the other side that the documents would show that the gas was of proper quality, and therefore (p. 426) they were evidence for both sides: *London Gas Light Co. v. Chelsea*, 6 C. B. N. S. 411. This case is an instance of the difference in practice at common law and equity in respect of the conclusive character of the affidavit of the party as to his documents; see *ante*, p. 511.

In an action for negligence against a railway company the company were compelled to produce reports relating to the lighting of the station (insufficient



lighting being alleged as one of the causes of the accident), but not reports of other accidents at the station, nor documents showing the number of tickets issued at the station; and the plaintiff was compelled to discover his business accounts for five years: *Anon.* W. N. 76, p. 53.

In an action by a consignee against a shipowner for damage to goods by reason of the ship's unseaworthiness production was ordered in the plaintiff's favour of surveys, general average statement, bills for repair, protest and log book, it being considered that in a case of this kind where the plaintiff could have no means of informing himself of matters occurring in a foreign port except by looking at the documents (see as to this *ante*, p. 300), there was no distinction between an underwriter and any other person, though it might be otherwise as to matters occurring at the time of the contract: *Daniell v. Bond*, 9 C. B. N. S. 716: and see *Kellock v. Home and Colonial Insurance Co.* 12 Jur. N. S. 653, where underwriters (the defendant company) themselves were ordered to produce for inspection the log of a ship which they had at their own risk repaired after its abandonment and brought home, but not the company's risk book ledgers surveyor's report and letters between Lloyd's on the defendant's behalf and the plaintiff's solicitors and brokers: see further as to underwriters, Book III. Chapter II. See also *Ticizell v. Allen*, *Rundle v. Beaumont*, and *Rowe v. Howden* as to inspection of shipping documents under the old common law equitable jurisdiction, *ante*, p. 268.

In actions for breach of promise of marriage the defendant would be allowed to inspect letters written by him to the plaintiff under the common law equitable jurisdiction: see *ante*, p. 267: and in *Chute v. Blennerhasset*, 16 I. R. C. L. App. 9, each party was allowed to inspect the letters that he or she had written to the other party. In *Pape v. Lister*, L. R. 6 Q. B. 242, the defendant was allowed to inspect letters from himself (and also those to himself) as bearing only on the question of damages, he admitting the promise: see also *ante*, p. 21, generally as to discovery with this object: and see *Ladds v. Walthew*, *post*, p. 569 (plaintiff).

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### PART III.

#### ACTIONS FOR THE RECOVERY OF LAND.

Actions for the recovery of land though subject to the same general principles as other actions require special consideration in connexion with the proposition the subject of this Chapter, namely that a party is not bound to discover the evidence of his case or title.

Many of the cases discussed or cited *ante*, Parts I. and II. of this Chapter (see pp. 453, 481, 490, 502, 507—510) were or were not in the nature of actions for the recovery of land.



I. *As to the Plaintiff's Right to Discovery in Actions for the Recovery of Land either by a Legal or Equitable Title.*

(a) *Generally—Fishing Actions—Vague or embarrassing Claims.*

Generally the position of a plaintiff in such actions, just as in actions for the recovery of any other property, seems open to the observation that the issue being whether or not he is entitled to the land, and not whether or not the defendant is entitled to it, any discovery which goes merely towards impeaching the defendant's title is immaterial to the determination of that issue: see *ante*, pp. 458, 467, 498, as to the relative positions of a plaintiff and defendant in this respect: and see *post*, p. 525.

From the earliest times the courts have been always careful to protect a person in possession of land from undue inquisition into his title: see the cases *post*. And so now: see *post*, (b) and (c): and see Ord. XXI. r. 21, *post*, p. 527.

The mischief of the exposure of documents of title extends beyond the particular action: for though the title might not be defective as against the particular adversary in the action, the documents might reveal defects of which other persons might take advantage: *Bellwood v. Wetherell*, 1 Y. & C. p. 220: *Vansittart v. Barber*, 9 Pri. 642: *Phillips v. Phillips*, 40 L. T. p. 822: Wigr. Pl. 5, referring to *Cocks v. St. Bartholomew's Hospital*, 8 Ves. 141: *Shaftesbury v. Arrowsmith*, 4 Ves. p. 71: *Lyell v. Kennedy*, 20 Ch. D. p. 488, cited *post*, p. 526: *Kettlewell v. Barstow*, L. R. 7 Ch. p. 694, cited *post*, p. 523.

Allusion has been already (see p. 16) made to fishing actions: (and see also *ante*, pp. 461, 476, as to fishing discovery generally). It is mainly in connection with the title to land that actions of this kind have been instituted. So great is the temptation to a person with some fancied claim to another person's land to get an opportunity of ransacking his title deeds in the hope of discovering some defect in the title that the most shadowy cases have frequently been launched with the view of finding out something about the title through the

machinery of discovery: see *Phillips v. Phillips* referred to *post*, p. 521.

In early times the judges frequently expressed their strong disapprobation of actions of a fishing character: *Renison v. Ashley*, 2 Ves. jun. p. 461: *Ivy v. Kekewick*, *ibid.* 679: *Shaftesbury v. Arrowsmith*, 4 Ves. p. 71: *Ryves v. Ryves*, 3 Ves. 342: *Buden v. Dore*, 2 Ves. 444: *Munday v. Knight*, 3 Hare, 497, p. 502: and see *Adderley v. Spencer* and *Ritson v. Danvers*, referred to in Redes. Pl. 190: and see *O'Connor v. Malone*, *post*, p. 530.

"This is a fishing bill to know how a man makes out his title as heir. He is to make it out: but he has no business to tell the plaintiff how he is to make it out:" *Ivy v. Kekewick*, bill by heir claiming as heir ex parte maternâ seeking discovery of the particulars of the pedigree (see *post*, p. 528, as to discovery of pedigree) of the defendant claiming as heir ex parte paternâ.

"You cannot come by a fishing bill in this court and pray a discovery of the deeds and writings of the defendant's title. If indeed there were any charge in the bill, general or special, that the defendant had in his power deeds and writings of plaintiff's title, an answer must be given thereto" (see *ante*, pp. 475, 491): *Buden v. Dore*.

In *Ryves v. Ryves* the plaintiff filed a bill which contained nothing more definite than an allegation that under some deeds in the defendant's possession he was entitled to some interest in some property in their possession, specifying neither deeds interest nor property.

As a matter of pleading the claim may be so uncertainly or indefinitely stated as to make it demurrable (but not under the new rules): Redes. Pl. 41: Dan. Ch. Pr. p. 309: *Houghton v. Reynolds*, 2 Ha. p. 267: *Munday v. Knight*, 3 Ha. 497, pp. 501—502: and see Wigr. Pl. 190—203: or under the present practice liable to be struck out as embarrassing under Ord. XIX. r. 27: see *Phillips v. Phillips*, 4 Q. B. D. 127, referred to *post*, p. 521. Where the matter essential to the determination of the plaintiff's claim was charged to rest in the knowledge of the defendant or must of necessity be in his knowledge and was consequently a part of the discovery sought by the bill a precise allegation was not required: Redes. Pl. 42, referring to *Baring v. Nash*, 1 V. & B. 551, p. 553: but see also *Wormald v. De Lisle*, 3 Beav. 19: and see *Wright v. Plumtree*, 3 Madd. 411: and *Whyte v. Ahrens*, *ante*, p. 36.

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(b) *As to the Plaintiff's Right to Discovery and Production of Documents* (1) *in particular as to the Affidavit of Documents*, (2) *generally*.

(1)

It might be supposed that the validity which, as has been seen (*ante*, p. 503), the court attaches to the party's oath as to the nature and contents of documents constituting his own evidence would afford a sufficient protection against their improper exposure, and that every person would thus have in his own hands the means of protecting himself to every legitimate extent from exposing his documents of title. Even however the mere making of the affidavit of documents may be prejudicial: (see as to the distinction between the order for the affidavit in chancery and at common law, *ante*, p. 154). The affidavit may in many ways, even, as has been pointed out by Pollock, C. B. in *Adams v. Lloyd*, 24 L. J. Ex. p. 505, by the paucity or absence of documents, give or suggest information which the adversary might be able to use to the prejudice of the party making the affidavit: see *Phillips v. Phillips*, 40 L. T. p. 817, where counsel for the plaintiff urged that if the affidavit were made he would then be able to specify the particular documents under which he claimed. It must be admitted however that by the recent decisions see *ante*, pp. 488—490, the necessity of describing the documents has been so limited that the danger of disclosing information of importance in the affidavit is very much diminished.

An objection suggested by Lindley, J. in *Phillips v. Phillips*, 40 L. T. p. 821 (see this case cited *post*, p. 522) is clearly one of substance: namely that where the plaintiff's case is vague and indefinite the defendant cannot know what documents to include in his affidavit.

Qu. whether it would ever be ordered before statement of claim: see *Phillips v. Phillips*, 40 L. T. 815, cited *post*, p. 522: but see the suggestion there made (*post*, p. 522) as to the admissibility of interrogating to a particular document.

Qu. whether at any stage of the action it is so much a matter of course as in an ordinary action: see *Phillips v.*

*Phillips*, cited *post*, and *post*, p. 522: *ante* (a): and *post*, p. 520, as to any distinction between a claim by a legal and by an equitable title.

The practice pursued by Jessel, M.R. in chambers of invariably making the common order (see *ante*, p. 154) after statement of claim did not apply to actions for the recovery of land: *Phillips v. Phillips*, 40 L. T. p. 822. The order would frequently be deferred until after defence: *ibid*.

In the *New British Mutual Investment Co. v. Peed*, 3 C. P. D. 196, an action for the recovery of land by a legal title, the order was made, Denman and Lindley, JJ. considering that in this respect there was no difference between an ejectment action and any other action, and, per Lindley, J. that the rule that the defendant in ejectment could not be made to disclose his title was never carried in equity to the extent of allowing him to refuse to make an affidavit of documents (and see *Rumbold v. Forteath*, *post*: and Chitty, J. in *Daniell v. Ford*, 47 L. T. p. 577, commenting on the language of Lindley, J. *ante*). In *Phillips v. Phillips* however before the same judges Denman, J. at p. 818, observed that the case of *New British, &c. Co. v. Peed* was not much discussed, and that although the same rule applied to ejectment actions a different rule of discretion might be desirable: and see extracts from *Phillips v. Phillips*, 4 Q. B. D. 127 and 40 L. T. 815 referred to *post*, p. 521. An affidavit was held necessary in *Wrentmore v. Hagley*, 46 L. T. 751, following *New British, &c. Co. v. Peed*. In *Daniell v. Ford*, 47 L. T. 575, affirmed W. N. 83, p. 27, Chitty, J. refused to follow *New British, &c. Co. v. Peed*, considering that the principle of the decision of the Court of Appeal in *Lyell v. Kennedy*, 20 Ch. D. 484, negating the right of a plaintiff in an action for the recovery of land by a legal title to interrogate, was applicable to an order for an affidavit of documents, there being no distinction of principle between them: (and this is no doubt so, see *ante*, pp. 155, 220). *Lyell v. Kennedy* however was subsequently reversed in the House of Lords, see *post*, p. 521: *Daniell v. Ford* therefore must be considered as overruled.\* See also *Fortescue v. Fortescue*, cited *ante*, p. 490, where an affidavit was made.

Under the practice in chancery the order seems to have generally been made.

In *Rumbold v. Forteath*, 3 K. & J. 44, a suit by an heir-at-law against devisees for discovery in aid of an ejectment action and for an injunction against setting up terms, but by the offer of the defendants not to set up terms reduced to a mere suit for discovery, on motion by the plaintiff for production of documents Lord Hatherley in making an order for the common affidavit said, "It may probably be of little use, but I think that the common affidavit must be made. It is a very different question whether the defendants will be compellable to produce the documents in their possession: but at present I cannot say that there may not be documents in their possession proving the plaintiff's heirship (see as to this *post*, p. 523) or in some way assisting his case."

So the order was made in *Quin v. Ralliff*, cited *post*, p. 524: see also *Potter v. Waller*, cited *ante*, p. 277.

(2) See *ante*, p. 518.

See as to actions for the recovery of land where the boundaries or parcels are in dispute, *ante*, p. 508.

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\* It seem that before the order was drawn up *Lyell v. Kennedy* was reversed and an order was made for an affidavit: 27 S. J. p. 332.

See *ante* (1) as to the affidavit of documents in particular.

There is, it is conceived, no distinction between the right of a plaintiff in an action for the recovery of land claiming by a legal title and one claiming by an equitable title to discovery and production of documents. In each case the plaintiff is entitled, as in fact in any other action, to the production of any documents which will assist him in making out his title: see *Lyell v. Kennedy*, *post*, p. 525, with regard to interrogatories: and *ante*, p. 274, as to the heir.

In the court below in *Lyell v. Kennedy*, 20 Ch. D. at pp. 491—492 (an affidavit of documents having been made and protection claimed for them as relating solely to the defence of the defendant's own title) Jessel, M. R. held that the utmost that the defendant could be asked to produce would be the deeds or documents relating to the plaintiff's title, and that, the defendant having sworn that they related solely to the defence of his own title, quite apart from the rule as to discovery in an action of ejectment the plaintiff was not entitled to see them. In an ordinary action however the words of protection here used would not have been sufficient: see *ante*, pp. 484, 494. The judgment of Brett, L. J. was more guarded. He considered that in actions of ejectment the court should be very careful in ordering production of documents, though the same rule did not apply to discovery of documents as to administering interrogatories, that the plaintiff was entitled to see deeds or documents alleged by him and admitted by the defendant to support his title, but that if the defendant swore that they solely related to his own title, in ejectment at all events that was a sufficient answer. But qu. It is conceived that as in any other action there must be an assertion denying that they contain anything supporting the plaintiff's title: though, for the reason stated *ante*, p. 516 (and see *post*, p. 525), no assertion negating the existence therein of any matter impeaching the defendant's title is necessary. In the House of Lords, 8 App. Cas. p. 229, a further affidavit was ordered but apparently in respect of other (but qu. whether not the same or some of them) documents for which protection was intended to be claimed as within the doctrine of professional privilege or as being consequentially relevant, but the description of which did not bear out the claim.

The only distinction between an action for the recovery of land and any other action seems to lie in the special care which the court will take to limit the inspection to documents which clearly appear by the defendant's admission to be of such a character: the reluctance of the court to grant any discovery in actions of a fishing character has been already (see *ante*, p. 516) pointed out. "A defendant is entitled to protect himself against fishing attempts to get at his title deeds and will be entitled to prevent any one from getting that which he pledges himself to contain only his own title, and not to contain any evidence in any way supporting the title of the plaintiff:" Cotton, L. J. in *Phillips v. Phillips*, 4

Q. B. D. p. 140. And Denman, J. in *Phillips v. Phillips*, 40 L. T. p. 820, referring to this passage regards it as containing two propositions, (1) the right of the party to resist making the affidavit of documents, (2) his right to refuse actual production. So again Cotton, L. J. in another part of his judgment in that case says (p. 140):—"Before an order ought to be made for the production of any title deeds under the control of a person who is in possession of land, when an attempt to get them is made by a person who never has been in possession, at least the party applying ought to show some reasonable case which he believes to be true before any court ought to order a defendant in possession of land to produce his title deeds, the production of title deeds obviously exposing a man to many dangers to which he ought never to be made liable." And again on the same page:—"Rules are laid down for the protection of persons who are in possession of estates to protect them against attacks from persons who hoping to find some blot in their title sometimes bring actions against them without reasonable cause."

In this case the plaintiff alleged in his claim that by certain deeds, assurances, wills and documents in the defendant's possession he was entitled as heir male and residuary devisee to some persons who lived upwards of 200 years ago. The claim was struck out as embarrassing. It was said by Brett, M. R. p. 135: "If the deeds had been in the plaintiff's own possession it is impossible to say that those deeds ought not to have been set out, but if they meant to rely on the fact that those deeds are in the possession of the other side that might excuse a particularity of description but cannot excuse some statement of it. . . . It is impossible that the plaintiff can have a knowledge that he is entitled to possession if he knows nothing about the deeds." . . . He then suggests that, though the plaintiff did not know the contents of the deed or the person who made it, he might have some admission that the defendants had in their possession a deed which gave him title: but, if that were so, the admission was a fact which ought to be stated in the pleadings. "But, if he has no such admission or evidence and does not know what the deed is under which he is about to claim, that is saying in other words that he does not know what his claim is. If he does not know what his claim is he has no right to make a statement of claim at all." And so Cotton, L. J. p. 140: "If a plaintiff is doing something more than merely guessing that by possibility he may make out his title to this estate, he must know something about it sufficient to enable him to state the facts on which he thinks the possession of this estate must come to him."

The statement of claim having been struck out, the plaintiff adopted a suggestion thrown out by Bramwell, L. J. p. 131 (and see Cotton, L. J. p. 140) that he should make an independent application for discovery and then amend his pleading, by analogy to the cases at common law where the plaintiff when unable to give further and better particulars because the materials for giving them were in the hands of the defendant would be



allowed to make an application for discovery for that purpose: (see *ante*, pp. 160, 161). An application for an order for an affidavit of documents was thereupon made, supported by affidavits alleging that there were in the defendant's possession documents, mentioning in particular two documents which would establish his claim. Affidavits in answer were filed on behalf of and by the defendants meeting more or less completely these allegations, and generally denying the possession of any document impeaching their title or supporting the plaintiff's title "so far as the same has yet been disclosed." The court refused the application: *Phillips v. Phillips*, 40 L. T. 815: Denman, J. p. 819, disapproving the suggested analogy between an ordinary action where particulars are required and a case in which an attack is made on persons in possession of property by an attempt to get an affidavit of discovery as to the whole title deeds of the persons in possession, and considering that no such application as the present would have been countenanced by Bramwell, L. J.: and so Lindley, L. J. pp. 821—822: and in particular, p. 822, considering that there were no special circumstances disclosed in the affidavits which should make them depart from the ordinary practice (see *ante*, p. 159) which would be to refuse it as a matter of course, though it might be that the defendants' affidavit would be insufficient to protect one of the documents from actual production (p. 823) if made after an order for discovery of documents: and that in this particular case (p. 821) the defendant ought not to be forced to discover documents relating to the alleged title without knowing what it was except that the plaintiff wanted possession: for that he would be placed in a very difficult position not knowing what documents to include in his affidavit as relevant to the alleged title when he could not tell what that title was and he might be tempted to swear in a reckless way that he had none.

Leave to interrogate as to a particular document might in some cases be granted before claim: *ibid.* pp. 822—823, Lindley, L. J. thinking that what Bramwell, L. J. intended was an application for some limited discovery of this kind, and that for such an application these affidavits might perhaps have been sufficient.

The judgment of the Court of Appeal in *Kettlewell v. Barstow*, L. R. 7 Ch. 687, may also usefully be consulted in this connection.

The action was one for recovery of land by an heir claiming mainly by an equitable title (qu. as to any distinction between a legal and equitable title see *ante*, p. 520). The defendant pleaded to the whole of the relief and discovery, except as to certain matters connected with the plaintiff's pedigree (of which he professed ignorance), that the plaintiff was not heir: issues as to his heirship were directed. The defendant in his affidavit of documents claimed protection for documents in one schedule in effect as evidencing or relating to (see as to "or relating to" *ante*, p. 487, and generally as to this form of protection *ante*, p. 482) his own title and not supporting or relating to any estate right title pedigree or heirship claimed by the plaintiff or any part or link of the same; and for the sealed up portions of two copies of pedigrees in the same words or "that they did not relate to the matters in question in the cause:" leaving uncovered such parts as related to the direct line through which the plaintiff claimed. A further affidavit was ordered by Bacon, V. C. (the order not being disturbed in the Court of Appeal) as to the first-mentioned documents on the ground of insufficient description (see as to this *ante*, p. 229) in the schedule: the pedigrees he ordered to be uncovered and produced as being indivisible: (see *post*, p. 524, as to this). The following are extracts from the judgments of James and Mellish, LL.J.:—"In a case like the present where the plaintiff gives no information as to his own pedigree but merely states in his bill that he is heir ex parte maternâ, it would be very dangerous if he were allowed to



enter upon a roving enquiry which might result in his finding flaws in the title of the defendant for the benefit of somebody else. The plaintiff is in substance saying 'If you show me all your documents I may find evidence which may enable me to turn you out of possession.' Every document in the possession of the defendants may in some indirect way help the plaintiff to prove something: but, before we can order this pedigree to be uncovered after such an affidavit as the defendants have made, we must see reason to believe that the covered part contains what would tend to prove something which the plaintiff has to prove at the hearing:" James, L. J. p. 694. "This case is one in which we ought to be very cautious as to ordering discovery. The intestate died in 1858 possessed of a considerable estate and the defendants are in possession both of the estates and the documents of title. The plaintiff states his title in the vaguest way so that one cannot help suspecting this to be a mere fishing bill where the plaintiff is not aware of any title in himself but is trying to find out whether he has not one. . . . We do not know the plaintiff's case and cannot see that the discovery has any bearing on it. The defendants swear that it has not, and under such circumstances it ought not to be ordered, for its production might be very prejudicial to the defendants by disclosing something which would be mischievous to them in proceedings between them and third (see *ante*, p. 516) persons:" Mellish, L. J. p. 694.

It was said by Lord Hatherley in *Rumbold v. Forteath*, 3 K. & G. 748 (and see a passage in his judgment *ante*, p. 519) p. 750: "there is nothing in which the court should be more careful in granting an order for production of documents in aid of an action of ejectment:" and he observed that, if any order should have to be made in the case before him, he would take care to limit the discovery to that to which the plaintiff was strictly entitled.

In *Dunn v. Ferrier*, 18 W. R. 129, which was said to have become a mere ejectment action, the plaintiff was not allowed to see documents (letters pedigrees and counterpart leases) described as evidences of the defendant's own title merely to assist him in impeaching the defendant's legal title.

Where a person recently inducted brought an action of ejectment, and the defendant claimed to be tenant from year to year, the latter was held bound to produce the agreement of tenancy: *Anon.* W. N. 76, p. 11: but this order could have been made on the principles of the common law equitable jurisdiction discussed *ante*, p. 264.

The plaintiff is entitled to see all documents showing or relating to his pedigree; just as he may interrogate thereto: see *post*, p. 526.

See as to the heir, *ante*, p. 274.

In *Rumbold v. Forteath*, an order having been made on the defendants for

the common affidavit, see *ante*, p. 519, they admitted possession of various scheduled documents, but objected to produce them on the ground that having regard to their answer such production was immaterial to the relief to which the plaintiff was entitled. Lord Hatherley after discussing and negating the general right of an heir to see the title deeds of the estate said, "My only doubt is whether in case any portion of the deeds and writings of which production is sought by this motion tends to show or relates to the pedigree of the plaintiff he would not be entitled to production of that portion;" and, after referring to *Hylton v. Morgan*, 6 Ves. p. 293, where Lord Eldon said "as to the pedigree I apprehend a production would be ordered," he made an order for a further affidavit stating which of the documents mentioned in their former affidavit and what parts related to or tended to show the plaintiff's pedigree, and for production of such documents with liberty to seal up such parts as did not relate to or tend to show the said pedigree.

In *Quin v. Ratcliffe*, 9 W. R. 65, a similar case the defendant in his answer to the original bill said that all his documents made out his own title and did not tend to show the plaintiff's title. The plaintiff thereupon amended his bill and alleged that the defendant's documents would establish his title as heir at law. The defendant answered that he had no documents affording evidence of the plaintiff's alleged pedigree or title and refused to set out a schedule or make the common affidavit. He was ordered to make the affidavit stating whether any and which related to the plaintiff's pedigree.

See also *Kettlewell v. Barstow*, *ante*, p. 522.

Recitals in a deed may assist in making out a pedigree: *Coster v. Baring*, 2 C. L. R. 811.

In *Wright v. Vernon*, 1 Dr. 344, a suit for the recovery of land by an equitable title, an action of ejectment having failed on account of outstanding terms, Kindersley, V. C. at p. 352 said, "I am of opinion that as to any documents in the defendant's custody, not being specially protected, tending to assist the plaintiff in making out the facts requisite to prove his descent the plaintiff would have a right to inspect them" the party being at liberty to seal up or otherwise conceal such parts as evidenced exclusively his own pedigree.

See as to extracts from parish registers showing a pedigree, a pedigree obtained from the Herald's College, and a copy of a supposed pedigree *ante*, pp. 392—394, referring to *Wright v. Vernon*: and *Lyell v. Kennedy*.

Notes of a pedigree were protected in *Mattock v. Heath*, W. N. 75, p. 201, as being private memoranda made by the party for his own convenience: but qu. as to this ground see *ante*, p. 389.

A pedigree is not necessarily an entire or indivisible document of which the party is entitled to see the whole if he is entitled to see a part, so as to disentitle the adversary to seal up portions of it. It may contain the pedigrees of several people, of the plaintiff, of the defendants and of strangers to the course: *Kettlewell v. Barstow*, L. R. 7 Ch. pp. 693, 694, reversing the opinion of Bacon, V. C. contra: see this case referred to *ante*, p. 522.

(c) *On the Plaintiff's Right to interrogate (1) generally, (2) in particular as to the Nature of the Defendant's Title.*

(1)

There was never any doubt of the plaintiff's right to interrogate where he claimed by an equitable title: see *Lyell v. Kennedy*, 20 Ch. D. 484.

Nor is there now as to his right when he claims by a legal

title. A plaintiff in an action for the recovery of land by a legal title is entitled to exhibit interrogatories in order to obtain discovery from the defendant of all matters relevant to or tending to support his own case and not the defendant's case: *Lyell v. Kennedy*, 8 App. Cas. 217, pp. 223, 224, 227 and 233, reversing *ibid.* 20 Ch. D. 484.

The Court of Appeal held that the plaintiff in such an action had no right to interrogate at all, (1) on the ground that there was no instance of a bill of discovery having been filed by a plaintiff in aid of an ejectment action before the Judicature Act, (2) on the ground that the plaintiff in ejectment was not allowed to administer interrogatories under the C. L. P. Act referring to *Horton v. Bott*, 2 H. & N. 249, (3) that the Judicature Act was an act of procedure only and conferred no right to interrogate where none existed before, (4) that it was against public policy, for that a plaintiff in ejectment must recover by the strength of his own title alone and must prove that title by his own means, the defendant not being called on to answer anything or to disclose anything: (see Brett, L. J. p. 490, and *post*, p. 526, as to the views of Jessel, M. R. on this point).

As to ground (1) the following cases were cited before the House of Lords and regarded (p. 224) as showing that bills of discovery in aid of the plaintiffs at law in actions of ejectment were neither unknown to the Court of Chancery nor excluded by any rule or practice of that court; but that they were dealt with in the same manner and on the same principle as similar bills in other cases:—*Crow v. Tyrrell*, 2 Madd. 397; *Butterworth v. Bailey*, 15 Ves. 358; *Wright v. Plumtree*, 3 Madd. 481 (for discovery of settlement under which plaintiff claimed); *Pennington v. Beechey*, 2 S. & S. 282; *Drake v. Drake*, 3 Hare, 523, p. 525; *Bennett v. Glossop*, 3 Hare, 578, referred to, *ante*, p. 272; *Brown v. Wales*, L. R., 15 Eq. 147, referred to, *ante*, p. 510; and also *Hylton v. Morgan*, 6 Ves. 293, p. 294 (bill to restrain setting up outstanding terms); and *Jones v. Jones*, 3 Mer. 161, pp. 170—171 (bill for relief). The works of Sir James Wigram and Mr. Hare were also referred to, pp. 224—227, as showing no trace of any such exception to the ordinary practice in respect to bills of discovery by a plaintiff in ejectment. Other cases were also cited in the argument, p. 219, as far back as the time of Elizabeth. See also *Chadwick v. Broadwood*, 3 Beav. 308; *Cholmondeley v. Clinton*, 2 Mer. 71; and *Rumbold v. Forteath*, 3 K. & J. 44, 748 (cited *ante*, pp. 519, 523), a bill also praying relief, namely an injunction against setting up outstanding terms, but practically reduced to a mere bill for discovery by the defendant's offer not to set them up.

As to ground (2) it was pointed out, pp. 223, 230, that the discovery in question in *Horton v. Bott*, was of matters relevant only to the defendant's title and was therefore very properly refused: see further as to *Horton v. Bott* and this point, *post*, p. 527.

As to ground (4) it was said that, though it was true that a plaintiff in ejectment must recover on the strength of his own title (and so a plaintiff in many other actions as for the recovery of chattels, pp. 230, 232—233, and see *ante*, pp. 468, 516), there was nothing in public policy or in the policy of the law which deprived the plaintiff of the ordinary right of proving his own title by the lips of the defendant, pp. 233, 230, though it would be against public policy to assist him in searching into the evidences of the defendant's title, p. 223.

As to ground (3) it was held, agreeing with the Court of Appeal, that the right of discovery under the rules of the Judicature Act was not in principle more extensive than it was formerly in Chancery, pp. 223, 233: but as to this point, see *ante*, p. 8.

In this case\* the interrogatories were directed towards proving the plaintiff's pedigree and also for the purpose of repelling the defence of the statute of limitations on the ground of a fiduciary relationship: (see similar discovery in *Hardman v. Ellames*, cited *post*, p. 528). In *Kennedy v. Lyell*, 23 Ch. D. 387\* (see this case also referred to, *ante*, p. 359) the plaintiff there being the defendant in *Lyell v. Kennedy* was held bound, according to Jessel, M. R. see p. 391, to answer as to the nature of his possession (see as to this, *post*, p. 527), and as to the pedigree (the defendant's pedigree as alleged in his defence) so far as he knew it. Jessel, M. R. in *Lyell v. Kennedy*, 20 Ch. D. p. 488, seems to have considered that it might be theoretically legitimate to ask questions relating only to the plaintiff's title, but that in practice such questions might be so framed as to prejudicially affect the defendant's title either in the suit itself or in some new suit by another plaintiff, questions for instance as to pedigree, and that on that ground he should have no right to interrogate at all.

In *Nolan v. Shannon*, 1 Moll. 169, an Irish case, the plaintiff claiming (for the possession of land and discovery) as heir was held entitled to an answer to the statements in his bill relating to his own pedigree and the steps in it, a plea unaccompanied by an answer on those points being overruled.

In an action of ejectment for overholding on the expiration of a lease for lives and forty-one years, the only question being as to the date of the death of one of the lives, the plaintiff was allowed to interrogate thereto: *Read v. McJennett*, 6 I. R. C. L. 267.

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\* The plaintiff claimed as purchaser from the heirs of D. The defendant subsequently commenced an action of *Kennedy v. Lyell*, claiming as a common informer under 32 Hen. 8, c. 9, the penalty of half the value of the estate. The defence raised two grounds: first that the title purchased was not a pretended title, second that the owners were not out of possession, for that the plaintiff was in possession as agent for them.

(2) See *ante*, p. 524.

It has been pointed out (pp. 446, 448) that, in addition to the party's right as a matter of pleading to know what his adversary's case is, he is also entitled for certain purposes to have discovery of the facts on which the adversary relies to establish that case or of its nature as distinguished from the evidence of it. Where however the title to land is in question the proposition that a party is entitled to discovery of his adversary's title must be applied with some care, the word "title" having obviously a far wider meaning than the word "case." Where the discovery which is sought of the nature of the adversary's title does not go beyond a disclosure of the nature of his case it must be given. But a defendant who comes under the provisions of O. XXI. r. 21, and is thereby absolved from the obligation to plead his title unless it is an equitable one, it being sufficient to state that he is in possession, is not bound to disclose the nature of his title by way of discovery, for that title is not his case. In effect therefore such a defendant is protected from discovering the nature of his title. In *Horton v. Bott* (cited *ante*, p. 525) the purport of the judgment was that the plaintiff had no right to call upon a person in possession to state by what title he was in possession. In *Lyell v. Kennedy* the interrogatories related to the plaintiff's title: see *ante*, p. 526: \* but see *Kennedy v. Lyell*, *ante*, p. 526 (interrogatories as to the nature of defendant's, Kennedy's, possession).

In *Bleasby v. Bleasby*, 10 L. R. Ir. Q. B. C. P. Ex. D. 60, action by administratrix to recover possession of leasehold property of the intestate, interrogatories inquiring into the circumstances under which the defendant (intestate's son) went into possession, the instruments under which he held and the character of his possession were disallowed.

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\* It will be observed that in the Lord Chancellor's judgment some stress seems to be laid upon the expression discovery relevant or relating to the plaintiff's case. It is not clear from the judgment whether this expression was adopted as being that used in Sir J. Wigram's book in reference to discovery generally (not adopted here for the reasons pointed out *ante*, pp. 11—13), see pp. 227, 224: or whether it was adopted, see p. 223, in order to mark the exclusion of all discovery of the nature of the defendant's title.

See also *post*, p. 531, discussing *Metcalf v. Harvey* and other cases in connection with a plaintiff's obligation to discover the nature of his title. See as to any distinction in this respect between the position of a plaintiff and defendant in an ordinary action, *ante*, p. 458.

#### Other cases.

In the argument in *Lyell v. Kennedy*, p. 220, four cases, *Eade v. Jacobs*, 3 Ex. D. 337 (referred to *ante*, pp. 446, 457); *Toivne v. Cocks*, L. R. 9 Ex. 45 (referred to *ante*, p. 458); *Sketchley v. Connolly*, 11 W. R. 573; and *Harland v. Emerson*, 8 Bli. N. S. 62. (see *post*, as to these); were relied on in support of the proposition that the plaintiff could ask what case the defendant was going to make against him at the trial, *e.g.* whether he was going to deny that the plaintiff was heir or set up some other heir. *Hardman v. Ellames*, 5 Sim. 640: 2 M. & K. 732, may also be referred to as being somewhat similar to *Lyell v. Kennedy*. There it was held that a general plea of adverse possession was not sufficient, for it gave the plaintiff no notice of the defence he had to meet and that he must set forth how and in what manner and by whom the alleged possession was adverse, but (p. 740) a plea of "no heir" was good without averring who was the heir, for the defendant might be able to prove that the plaintiff was not heir but not who was, and there was no uncertainty as to the defence. In reference to *Harland v. Emerson* (see this case also cited *ante*, p. 500) it is sufficient here to say that neither on appeal nor in the court below did the decision rest upon or even involve the necessity of disclosing any matters connected with the defendant's own title, that is to say in this case answering interrogatories inquiring into his pedigree.

In *Sketchley v. Connolly* a plaintiff in ejectment was allowed to ask the defendant whether some other person was not the real defendant, and whether he was not defending it in the defendant's name and to protect his own interest, Blackburn, J. observing that there was no difference in practice between an ejectment and any other action: see also *ante*, p. 89, as to an interrogatory of such a nature.

In *Bennett v. Glossop*, 3 Ha. 578, cited in *Lyell v. Kennedy*, the defendant set out his title in the answer.

In *Baker v. Mellish*, 11 Ves. p. 76, Lord Eldon questions whether a court of equity would compel a defendant in ejectment to discover his title in answer to a bill of discovery.

In *Ivy v. Kekewick*, 2 Ves. jun. 679 (and see *ante*, p. 517) the defendant claiming as heir *ex parte paternâ* was held not bound to discover the particulars of the persons in his pedigree their births deaths, &c. to the plaintiff claiming as heir *ex parte maternâ*: and see *Kettlewell v. Dyson*, *post*, p. 534.

See also *Potter v. Walker*, *ante*, p. 277: *Grattan v. Wall*, *ante*, p. 449: *Commissioners of Sewers v. Glasse*, *ante*, p. 452: *Bute v. Lewis*, *ante*, p. 453: *Stroud v. Deacon*, *ante*, p. 505: *Adderley v. Spencer* and *Ritson v. Danvers*, Redes. Pl. 190.

A case of *A. G. v. Corporation of London*, 2 M. & G. 247, a suit for determining the respective rights of the Crown and the corporation to the bed of the Thames, was referred to both in *Lyell v. Kennedy*, 20 Ch. D. 484, and *Horton v. Bott*, 2 H. & N. p. 251, as apparently inconsistent with the limitation of the plaintiff's right to interrogate, but as being in fact an altogether exceptional case (and to some extent admitted by Lord Cottenham to be so, see p. 268), the question being whether the rights that the defendants were exercising were to be referred to their position as conservators or to the position of ownership which they claimed. Passages in the judgment in this case are referred to *ante*, pp. 447, 505. It is sufficient to state here that it was held that it was not enough for the defendants to deny the title of the Crown



and assert their own, but they must show a title which if proved would displace that of the Crown, p. 258; and therefore they must say under what charter or grant they claimed, for, p. 263, that was not an investigation of the defendants' title except as to the foundation of it (but the Crown was not to see the charters themselves for that would be investigating the evidence on which the defendants relied, p. 263), and also whether it was not true that no charters granted to them contained any grant of the soil, and this independently of the plaintiff's right to know what the defence was, and as part of his case for he had a right to a discovery of what they did or did not contain so far as it constituted his own title, p. 262, and also whether certain admitted acts were not referable to their title as conservators. See

### 528. To follow "*Other cases.*"

The distinction between an action for ejectment in which the defendant is protected from disclosing his title, and an action for trespass where he is not necessarily so protected, is well shown by a recent case of *Cayley v. Sandycroft Co.* 33 W. R. 577. The plaintiff alleged that the defendants had worked coal under his land: the defendants denied his title but did not state their own. They were held bound to give some answer to an interrogatory asking under what document, with the dates and parties thereto, or under what licence or authority, and from whom obtained, they claimed to be entitled to the coal; for the plaintiff was entitled to know what right the defendants were setting up against him, and it was no protection to say that the documents exclusively supported their own case, for it did not follow that the documents must be produced.

See also the recent case of *Bidder v. Bridges*, discussed *ante*, p. 446, in connection both with the plaintiff's (*post*, pp. 529—534) and defendant's (*ante*, pp. 527—529) obligation to discover the nature of his title.

The general distinction between the position of a plaintiff and defendant in regard to discovery has been pointed out *ante*, pp. 468, 498.

There are cases (see *post*) which would seem to lay a peculiar obligation on the plaintiff to give discovery and in particular of the nature of his title: see *ante*, p. 458, denying any such special obligation in an ordinary action: and see *ante*, p. 446,



as to the general obligation of a party to give such discovery, and *ante*, p. 527, as to a defendant's obligation in an action for the recovery of land.

*Lowndes v. Davies*, 6 Sim. 468, cross bill for relief and for discovery of, among other things, the births deaths residences &c. of the persons in the defendant's pedigree and of pedigrees and other documents: "I think it was very judicious in Mr. Lowndes to file this bill because it enables him to extort from Mr. and Mrs. Davies an answer as to every fact which can be brought forward by them to sustain their case at law, it being admitted that the case by which they are to succeed at law is the identical case by which they are to succeed in equity. And if a person will file a bill he is of course exposed to the ordeal which the defendant may subject him to by filing a cross bill; and he is then bound to set forth an answer to all the matter which concerns his title; for the truth of the matter which concerns his title is material to the defendant's defence in equity. With respect to those allegations which relate to certain matters regarding the plaintiff's title I think the defendant has a right to file a cross bill to know whether they are true or false: and though it may seem to be immaterial to ask whether the count had been delivered, it is a question that leads to that which is material, namely the truth or falsehood of the averments in the count." And being of opinion that he was *prima facie* entitled to the relief the V. C. overruled the demurrer.

This case is referred to in Wigr. Pl. 377, 378 and disapproved, as opposed to the rule that each party must stand on the strength of his own case and may not pry into that of his opponent's case, for that the discovery sought was not necessary to the defence of the action except so far as it might enable him to disprove the case of the plaintiff (see as to this point, *ante*, pp. 458, 494, and *O'Connor v. Malone*, *post*): that the only ground on which it could be supported would be that a plaintiff is subject to a more inquisitorial jurisdiction than a defendant, a proposition which he disputes (rightly it is conceived, see *ante*, p. 458), for that a plaintiff making an unjust claim is amenable to no greater censure than a defendant making an unjust defence, and each is entitled to the same privileges with respect to the evidence of his own title.

In *O'Connor v. Malone*, Sausse & Sc. 516, Sir Michael O'Loughlen, M. R. considered that the plaintiff was bound to discover the facts on which he relied to prove his pedigree, the births deaths residences &c. of all the persons therein, (not the names of his witnesses or their evidence, pp. 550—552), citing (pp. 545—547) *Lowndes v. Davies* (*ante*), for that there the discovery was not merely of the nature of the plaintiff's title, but was of facts that might tend to defeat the claim, to show that his case was fabricated or his claim barred, and also the contents of any statements of pedigree prepared by his father or other persons, or any documents relating to his pedigree, citing (p. 548) *Bolton v. Corp. of Liverpool*, 3 Sim. p. 487 (see this case *ante*, pp. 370, 495) where cases for counsel's opinion (at that date unprivileged see *ante*, p. 370) were ordered to be produced as tending to show that the plaintiffs had not that title which they alleged they had, and also (p. 549) citing *Storey v. Lennox* (see this case cited *ante*, pp. 410—413) on the general ground that (pp. 538, 540, 542) the defendant was entitled to discovery, though it did not tend affirmatively to establish his title but only to defeat the plaintiff's claim (see as to this *ante*, pp. 458, 494, 497): in particular that a plaintiff coming into equity to enforce his claim to an estate (p. 541) must disclose facts within his knowledge and perhaps unknown to his adversary which would if proved or admitted show that his claim was an unrighteous one, citing *Metcalfe v. Harvey* and other cases referred to *post*, p. 531, the defendant's case or title being that the plaintiff had no title, and distinguishing cases like *Iry v. Kekewick* (*ante*, p. 528) on the ground that there the discovery was sought from the defendant in possession at the instance of the party out of possession (pp. 537, 541, 550).

The M. R. in this case pushes the right of discovery beyond its proper limits. A plaintiff may as there said (p. 542) be compelled to answer on oath as to the truth of the statements in his pleadings, see *ante*, p. 448: he may be compelled to disclose the nature of his case if it is not disclosed in the pleading, see *ante*, p. 448: he may be compelled to answer questions on specific points tending to show that his claim is unfounded (see p. 452, suggesting a charge that plaintiff has an elder brother living), see *ante*, p. 464, and *post*, p. 532: but he cannot be compelled to disclose in answer to general questions every fact which it may be necessary for him to prove in order to establish his claim (as said p. 538): and as to the statements of pedigree it seems clear that, even if they were not evidence, they might have been protected as exclusively relating to his own title and containing nothing impeaching it, &c.: see *ante*, pp. 481—487: the documents in *Bolton v. Liverpool* being protected by no such statement.

In *Ingilby v. Shafto* (referred to fully *ante*, p. 448) Lord Romilly confined the defendant's right to discovery within very narrow limits: but on the ground that the right of a party filing a bill of discovery in aid of the prosecution of or the defence to an action at law was not on a level with that of a party seeking relief and discovery in the same action in equity, and not on any grounds connected with the peculiar position of a defendant in ejectment. He considered that the discovery ordered in *Flitcroft v. Fletcher* (see *post*, p. 534) could not have been obtained by a bill of discovery in equity. In *Garle v. Robinson*, 3 Jur. N. S. 633, bill by a defendant in ejectment for discovery of matters connected with his own title and also of the nature of the plaintiff's claim, the action was stayed until some sort of answer was given; for at all events he was entitled to an admission or denial of the statements in his bill as to his own title.

In two events it has been suggested that the plaintiff is under a special obligation to give discovery of the nature of his title (a), where the defendant claims no interest but is in the position of a quasi-stakeholder (b), where the defendant has been long in possession and the plaintiff is a stranger of whose title he is wholly ignorant. A passage in Lord Hardwicke's judgment in *Metcalf v. Henry*, 1 Ves. 248: perhaps originally suggested these exceptions. "The question," he says, "comes to this whether any person in possession of an estate as tenant or otherwise may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out and see whether that title be not in some other. I am of opinion he may to enable him to make a defence in ejectment even considering him as a wrongdoer against every body."

(a) See *ante*.

In Wigr. Pl. 379—382, *Metcalf v. Harvey* is supported on the following grounds, namely that it was not a case in which an adverse title was set up, but the defendant in ejectment claimed no interest in the property and was quasi a stakeholder,

and in fact filed his bill to compel the plaintiff to interplead with some other person, and that the bill might have contained charges which made it necessary for the plaintiff to give some answer as to the nature as distinguished from the evidence of his title. See also Hare, pp. 205—208 excepting cases of this kind from his proposition as to (see *ante*, p. 497) discovery affirmatively supporting the applicant's case. On the same grounds the learned author (Wigram) supports *Glegg v. Legh*, *Parker v. Legh*, 4 Madd. 193: *Bowman v. Lygon*, 1 Anst. 1: *Bellwood v. Wetherell*, 1 Y. & C. 211: *Whyman v. Legh*, 6 Pri. 88: (all of them bills of discovery in aid of the defence to suits for tithes): and *Bedford v. Macnamara*, 1 Pri. 208: (all of these cases cited *post*).

If by discovery of the nature of the party's title is meant something beyond a discovery of the nature of his case (see *ante*, p. 527), then it seems legitimate to rest cases of this character on their peculiar grounds.

But the cases are it is conceived illustrations of the point discussed *ante*, pp. 460—465, (and in particular, p. 462, referring to *Finney v. Forwood*), namely that in every action a party's right to discovery must be measured under some circumstances by the case which he has put forward in his pleadings. And where he alleges a case of the kind suggested he is entitled on general principles to discovery to support it, and the discovery to which he is thus entitled must of necessity have relation to the plaintiff's title.

In *Glegg v. Legh* and *Parker v. Legh*, where there was a definite charge that the plaintiff had conveyed away the tithes he was compelled to answer it but not to discover his title or to set forth his title deeds or the contents of them: see also *Whyman v. Legh*. In *Bowman v. Lygon*, p. 5, it was said that the plaintiff must answer whether the predecessor in title of the defendant had paid tithes; but there was no decision as to the exact measure of discovery to which the defendant would be entitled: see this case referred to in *Bellwood v. Wetherall*, p. 216. In *Bedford v. Macnamara*, an action on the covenant for dilapidations, the plaintiff was held bound to answer the charge of having conveyed away his interest to trustees, and also to produce the actual conveyance.

In *Bellwood v. Wetherall*, pp. 226—217, Lord Abinger drew a clear distinction between cases where the defendant made some definite allegation to the effect that the plaintiff was not or was no longer entitled to the subject-matter of the action either as having conveyed away his title to it or on other grounds, and that he feared being harassed a second time by some other person in respect of the same matter, and cases where no such definite allegation was made, under the latter circumstances refusing him discovery even

of the nature of the plaintiff's title, under the former circumstances conceding his right to have a discovery of the nature but not of the evidence of the plaintiff's title. Accordingly in this case, finding no sufficiently definite allegation of this kind, he refused to compel the plaintiff to disclose under what deeds he claimed to be entitled to the tithes: (compare *A. G. v. Corp. London*, cited *ante*, p. 528). See also *O'Connor v. Malone*, *ante*, p. 530, citing all the above cases.

(b) See *ante*, p. 531.

In the same case, at p. 218, he draws the following distinction in reference to ejectment actions. "Where a party is in possession of an estate and a perfect stranger comes to turn him out alleging himself to be the person entitled it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir at law—whether he claims under a devise—or whether he alleges any imperfection in the defendant's title deeds. There the defendant is taken by surprise and therefore I can easily understand in such a case why not the evidence but the nature of the title should be disclosed. But in cases of recent possession where parties well know the nature of each other's titles there is no ground to compel any such discovery as that which is here required." It must be remembered however that the inclination of Lord Abinger was to restrict somewhat unduly the right to discovery. Mr Hare in *Hare*, p. 211, refers to this distinction, and considers that it would be difficult to say what is recent and what is not recent possession. He also doubts the practicability of drawing an answer so as to disclose the nature without disclosing the evidences of that title.

The common law judges took the same distinction as Lord Abinger: these decisions however are not binding under the present practice.

In *Stoate v. Rew*, 14 C. B. N. S. Erle, C. J. at p. 211 said, "As a general rule, it is not permitted to a party to interrogate his opponent as to how he means to prove his case unless there be very special circumstances (under no circumstances, see *ante*, pp. 444, 447). If a man has been long in possession of an estate and a stranger comes to dispossess him, the defendant may call for some general information as to the nature of the title which is to be made against him. But it must necessarily be very much a matter of discretion depending on the particular circumstances of each case." So Willes, J. p. 211, "If it had been shown here that the defendant was wholly ignorant of the title intended to be set up against him and was therefore utterly un-

prepared to shape his defence:" and so on p. 209. So the same judges to the same effect in *Pearson v. Turner*, 16 C. B. N. S. 157. And *Flitcroft v. Fletcher*, 11 Exch. 543, the only reported ejectment action where interrogatories of this character were allowed, was in both of these cases and also in *Finney v. Forwood*, L. R. 1 Ex. p. 8 (see as to this and other actions of trover, *ante*, pp. 451, 462), and *Wallen v. Forrest*, L. R. 7 Q. B. p. 243, supported only on the assumption that it was a case of that character, a defendant having been in possession for a long time and assailed by a stranger of whose title he was ignorant. In *Wallen v. Forrest* a tenant, withholding possession of premises after termination of his lease, and defendant to an action of ejectment brought by the lessor, was not allowed to administer detailed interrogatories to the plaintiff in order to ascertain whether his title was expired, on the ground that he was a mere squatter and that it did not appear that he was being attacked by the true owner, and that it was a mere fishing application.

It was said by Blackburn, J. p. 240, in this case that the interrogatories in *Flitcroft v. Fletcher* only asked for such information as must formerly have been set out in a count on a writ of right. They inquired in what character or right he claimed, whether as heir-at-law of A., through what links, whether as grantees from or trustees of any and what heir-at-law, and whether he had any right or interest except as aforesaid and what was the nature of it. See *Ingilby v. Shaflo*, *ante*, p. 531, in reference to *Flitcroft v. Fletcher*. *Flitcroft v. Fletcher* was followed in *Kettlewell v. Dyson*, 18 L. T. 285, the defendant, claiming as heir of S. ex parte paternâ, being allowed to ask the plaintiff claiming ex parte maternâ through what links he claimed, but the plaintiff being refused leave to administer a similar interrogatory to the defendant. See further as to details of a pedigree, *post*.

It is difficult to say to what extent the plaintiff must discover the details of his pedigree. See *ante*, p. 528, as to a defendant's obligation to discover his pedigree.

As a matter of pleading it was stated in Dan. Ch. Pr. p. 272, to be sufficient in modern chancery practice for a plaintiff to state that he claimed as heir referring to *Kettlewell v. Barstow*, 17 W. R. 276: *Barrs v. Fewkes*, 12 W. R. 666: and see *Evelyn v. Evelyn*, *post*, and *Wright v. Vernon*, 1 Dr. p. 352: though formerly he must have stated how his title arose, referring to *Baker v. Harwood*, 7 Sim. 373. But according to Cotton, L. J. in *Phillips v. Phillips*, 4 Q. B. D. p. 139, it may be necessary in some cases to set out more or less fully the line of descent. But it does not follow that what would be sufficient as a matter of pleading would be sufficient by way of discovery. And in fact in *Evelyn v. Evelyn*, W. N. 80, p. 62, where it was held sufficient to say that A. died leaving B. his heir in the statement of claim, for only the facts need be stated not the evidence, the defendant could, it was said, interrogate the plaintiff and force him to show how he was heir. In *Phillips v. Phillips*, p. 134, Brett, M. R. considered that under some circumstances a pedigree might be merely evidence of the facts which had to be proved: in such a case it is clear it would be protected. See *O'Connor v. Malone* and *Loundes v. Davies*, *ante*, pp. 530, 531. See also *Davis v. James*, 50 L. T. 115, p. 117, where a plaintiff suing on the covenants in a lease as assignee of the reversion was held bound to state his title and the documents by which it became vested in him: (and see *Roberts v. Oppenheim*, *ante*, p. 504, n.). See also *Selby v. Selby*, 4 B. C. C. 12, where the defendant was compelled to discover details of his pedigree, but on technical grounds only.

## CHAPTER IV.

DISCOVERY WHERE THE PARTY'S RIGHT IS IN CONSCIENCE  
EQUAL TO THAT OF HIS OPPONENT.

IF a defendant has in conscience a right equal to that claimed by a person filing a bill against him though not clothed with a perfect legal title this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title: Redes. Pl. 199, 194. If the title of the defendant be equal in conscience to the title of the plaintiff equity which looks to the conscientious obligation of the parties will not interpose to compel a discovery: Hare, p. 89.

If the matter appeared clearly on the face of the bill the defendant might demur; but in general the defence had to be taken by way of plea: see Redes. Pl. 199, 274, 275: Hare, p. 89.

I. *A Purchaser for valuable Consideration without Notice.*

The most obvious case is that of a purchaser for valuable consideration without notice of the plaintiff's claim: Redes. Pl. 199: (a purchaser including of course a mortgagee for he is a purchaser pro tanto: see *Senhouse v. Earl*, 2 Ves. 450: *Fitzgerald v. Busk*, 2 Atk. 397: Redes. Pl. 275: *Wallwyn v. Lee*, 9 Ves. pp. 32, 33: see as to a mortgagee where his mortgage is admitted, *post*, Section III.).

Such a defence was good both to relief and discovery: Hare, p. 98: Redes. Pl. 135, 199.

The principle protecting a purchaser for valuable consideration without notice is as old as the institution of a court of equity: *Chandos v. Brownlow*, 2 Ridgw. P. C. p. 422: and see *Basset v. Nosworthy*, Finch, p. 103: *Wilks v. Bodington*, 2 Vern. 599: *Day v. Arundel*, Hard. 510: *Hellam v. Grove*,



Finch, 205: *Everenden v. Vanacker*, *ibid.* 255: *Gough v. Stedman*, Finch, 208.

It is an infallible rule that a purchaser for valuable consideration shall never without notice discover anything to hurt himself: Lord Finch in *Perrat v. Ballard*, 2 Ch. Ca. 72: and see *Heyman v. Gomeldon*, Finch, 34: *Collett v. De Gols*, Lord Talb. Ca. p. 69: *Jerrard v. Saunders*, 2 Ves. jun. pp. 457, 458, referring to *Fagg's case* or *Shirley v. Fagg*, 1 Eq. Ca. Ab. 134: *Gait v. Osbaldiston*, 5 Madd. 428: 1 Russ. 158: *Burlace v. Cook*, 2 Free. 24: *Basset v. Nosworthy*, Finch, 102: *Bishop of Worcester v. Parker*, 2 Vern. 254: *Hunt v. Elmes*, 27 Beav. 62: *A. G. v. Strutt*, 3 Beav. 396. If the defendant is a purchaser for valuable consideration without notice of the plaintiff's title a court of equity will not in general (qu. in general) compel him to make any discovery which may affect his own title: Redes. Pl. 288: and see Beames, Eq. Pl. 278: which may endanger it: Hare, p. 89: or impeach or weaken it: Fonbl. Eq. Vol. II. p. 490: or hazard it: Redes. Pl. 194, 199: and see *post*.

Lord Eldon thus defines the position of a purchaser for valuable consideration without notice in *Walshyn v. Lee*, 9 Ves. p. 33. "I have honestly and bonâ fide paid for this in order to make myself the owner of it and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you say I have placed myself in the article of purchasing bonâ fide." And generally he considered, p. 34, that there was sufficient ground for saying that such a person should not be called upon by confessions wrung from his conscience to say he has missed his object in the extent to which he meant to acquire it, and that the principle of the court was that against a purchaser for valuable consideration without notice the court gave no assistance. So Lord Loughborough in *Jerrard v. Saunders*, 2 Ves. jun. p. 458, says "The doctrine as to the jurisdiction of the court is this: you cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser having paid his money and denies all notice of the circumstances set up by the bill:" and on the same page "where he has fully and in the most precise terms denied all the circumstances mentioned as circumstances from which notice (see further *post* as to this) may be inferred it would be contrary to equitable principles to make him answer as to all the circumstances that are to blot and rip up his title." See also *Strode v. Blackburn*, 3 Ves. pp. 224, 225.

A purchaser may subsequently to his purchase have found out a defect in his title, and if he should produce title deeds they might make use of them to overturn his title at law: *Aston v. Aston*, 3 Atk. 301: and see Hare, p. 89.

The plea properly pleaded (see *post*) protected the defendant from giving any answer to a title set up by the plaintiff: Redes. Pl. 279, referring to *Brereton v. Gamul*, 2 Atk. 240.



No discovery or production of deeds or writings (that will weaken his title, *i. e.* any relating to his title: *Wallcyn v. Lee*, 9 Ves. p. 27, *arg.*: and see *ante*) other than the purchase deeds, see *post*, p. 538, and also perhaps those of the title if any connecting the purchaser with the defendant, see *post*, need be given or made: see Dan. Ch. Pr. p. 537: Redes. Pl. 279: *Salkield v. Science*, 2 Ves. 107: *Fagg's case*: *Burlace v. Cook*: *Heyman v. Gomeldon*: *Hunt v. Elmes*: *A. G. v. Strutt*: Beames, Eq. Pl. 278 (all cited *ante*, p. 536): unless where charged to show notice: see *post*. No list or schedule need be made: see the plea in *Wallcyn v. Lee*, 9 Ves. 24, set out in Beames, Eq. Pl. 341. No discovery of their dates or contents need be given: see *Everenden v. Vanacker*, Finch, 255. The description of any one deed might contribute to defeat his title: see Hare, p. 23; *Wallcyn v. Lee*, p. 27.

In *Hunt v. Elmes* the mortgagee of a term brought a bill for foreclosure against a defendant who set up purchase for value of the fee without notice. He was protected from producing the title deeds muniments of title and abstract relating to the fee (a particular deed being excepted as having been set out in the answer, see *ante*, p. 251): ultimately a decree for foreclosure was made (2 D. G. F. & J. 578), but no order was made for delivery up of the deeds, &c.

The assignee of a lease was allowed to demur to a bill to discover whether it had not expired: *Bishop of Worcester v. Parker*, 2 Vern. 254: where he was a purchaser: Madd. Ch. Pr. pp. 277—278: but not the lessee himself: *ibid.*

All matters charged in the bill as evidence of notice must have been denied: *Jerrard v. Saunders*, 2 Ves. jun. 187, 454: *Radford v. Wilson*, 3 Atk. 815: *Pennington v. Beechey*, 2 S. & S. 282: Sugd. V. & P. pp. 788—789: or as to which the defendant was interrogated under the later practice: *Gordon v. Shaw*, 14 Sim. 393: so the old charge of possession of documents showing that he had notice: Sugd. V. & P. p. 790: *Hardman v. Ellames*, 5 Sim. p. 650: *Portarlington v. Soulby*, 6 Sim. 356 (notice of invalidity of a bill of exchange): and see *ante*, p. 500: and any documents, even title deeds, alleged to show notice must have been produced unless the allegation was properly denied: see *Neesom v. Clarkson*, cited *ante*, p. 262: *Addis v. Campbell*: and generally *ante*, pp. 260, 505. In *Addis v. Campbell* an affidavit was admitted for the purpose of verifying a document neither admitted nor

denied by the answer in order to show notice: see *ante*, p. 212, n.

As a matter of pleading and in order to the validity of the plea certain particulars must have been stated.

After some difference of opinion it seems to have been settled that the plea must have stated the deeds of purchase, setting forth the dates parties and contents briefly, the time of their execution (this last questioned in Dan. Ch. Pr. p. 584), and perhaps also (see also *Wagstaffe v. Reid*, *post*, p. 539) the amount of the consideration: Sugden V. & P. pp. 788—789: Dan. Ch. Pr. p. 584; Hare, p. 95; Redes. Pl. 275—280; Beames Eq. Pl. pp. 233—246: and see *post*: and qu. whether in a case where the defendant was not himself the purchaser he must not have stated the title by which he claimed under the purchaser: see *Jerrard v. Saunders*, 2 Ves. jun. p. 455: but see the plea in *Wallwyn v. Lee*, 9 Ves. 24, set out in Beames Eq. Pl. 341.

### As to production of the purchase deed.

It is laid down both in text-books and in cases that though he might plead to discovery of deeds and writings he must except his own purchase deeds for he pleaded them: Redes. Pl. 279: Beames Eq. Pl. 278: Dan. Ch. Pr. pp. 584, 587: *Salkield v. Science*, 2 Ves. 107: *Ex parte Caldecott*, Mont. pp. 57—58. Mr. Hare, pp. 95—96, understands by discovery not production of the purchase deed, but discovery of certain of the contents in order to the validity (see *ante*) of the plea (and see Beames Eq. Pl. 278: Wigr. Pl. 207), considering that in an ordinary case production would not be ordered and referring to *Kennedy v. Green* (see *ante*, p. 261) where the order for production was expressly based on the special circumstances of the case. But qu. whether it is so understood in Dan. Ch. Pr. p. 584, for in a note an old case of *Watkins v. Hatchet*, 1 Eq. Ca. Ab. 36, where production was refused is referred to as *contra*. No doubt in *Aston v. Aston*, 3 Atk. 301, it is said that a jointress ought to produce her jointure deed and a purchaser his purchase deed that it may be seen whether the lands they claim are comprised in their deeds. But in other cases, *Petre v. Petre*, 3 Atk. 510: *Senhouse v. Earl*, 2 Ves. 450, it is laid down that production of the jointure deed (discovery of it, Redes. Pl. 199) will not be ordered until confirmation though the deed (or its date, *Chamberlain v. Knapp*) must be set forth, and (see further *post*) the lands comprised in it with sufficient certainty: see Redes. Pl. 279: *Chamberlain v. Knapp*, 1 Atk. 52: *Harrison v. Southcote*, 2 Ves. p. 395: Sugden V. & P. 788.

On principle it is conceived the deed ought to be protected in order that no advantage may be taken of any defects therein to impeach it: see *Hellam v. Grove*, Finch, 205: and *ante*, p. 536: and see *post*, p. 544, as to a mortgage deed: (except in cases of the nature of *Kennedy v. Green*, where the deed is alleged to show notice and the allegation is not satisfactorily met: see *ante*, p. 261 and *ante*): unless it is liable to production as being referred to in the pleadings, see *ante*, p. 244.

As to discovery of the lands articles or other property comprised in the purchase, or of the deeds, in order to recover them.

The plea necessarily required discovery of matters which would show the quantity of the land or subject-matter in question over which the plea substantially extended: Hare, p. 96: and see the cases cited *ante* as to lands comprised in a jointure deed.

Qu. as to *Addison v. Walker*, 4 Y. & C. 447 (cited *ante*, p. 263), a suit to

impeach a security, where the mortgagee was protected from discovering the part of the testator's estate over which he claimed to be mortgagee.

It was usual to set out the parcels as comprised in the deed: *Beames Eq. Pl.* 343.

He must state affirmatively or negatively what he has purchased: *Hare*, p. 96: *Hoare v. Parker*, 1 Cox, 224: 1 B. C. C. 578: where a plea to discovery of articles pawned to the defendant without notice that the person pawning them had only a limited interest therein was overruled on the ground that the defendant had omitted to aver that he had no other articles than those so pawned to him.

He is not bound to discover the specific things in his possession: *Hare*, p. 96. In *Hoare v. Parker* Lord Thurlow observed that he saw no room to make a distinction between the case of a discovery being sought of the title of the purchaser and of the specific things in his possession, but that the same rule must apply to both, namely that a purchaser for valuable consideration is not bound in conscience to assist the right owner in the legal recovery of the subjects purchased under such circumstances. A defendant was protected from discovery of articles pawned to him by a bankrupt without notice of an act of bankruptcy: *Abery v. Williams*, 1 Vern. 27. So a purchaser of lands (*Anon.* 2 Ch. Ca. 136), or goods, from a bankrupt without notice: *Perrat v. Ballard*, 2 Ch. Ca. 72: *Browne v. Williams*, 2 Ch. Ca. 135: *Wagstaffe v. Reid*, 2 Ch. Ca. 156 (where also he was ordered to discover what he paid for them, see *ante*, p. 538, as to setting out the consideration): and see *Collett v. De Gols*, Lord Talb. Ca. p. 69.\* In *Marsden v. Payshall* however, 1 Vern. 408, inspection of articles pawned to the defendant by the plaintiff's agent was ordered for the purpose of enabling the plaintiff to bring an action at law for them. Lord Eldon's opinion, see *Wallwyn v. Lee*, *post*, was in accordance with *Hoare v. Parker* and other cases above, disapproving Lord Rosslyn's opinion in *Strode v. Blackburne*, 3 Ves. p. 226, that in such a case as *Hoare v. Parker* the articles must be described in order that the plaintiff might be able to recover them by an action of detinue or trover. See also *Macclesfield v. Davis*, 3 V. & B. 16, where on the express ground that there was no plea of purchase for value without notice Lord Eldon ordered inspection of heirlooms deposited by a tenant for life.

Where a tenant for life made a mortgage professing to be owner in fee, and on his death the remainderman entered into possession and brought a suit for discovery and delivery up of the title deeds against the mortgagee, Lord Eldon allowed a plea of purchase for value without notice, for, though the mortgagee of necessity lost the property on the mortgagor's death, yet there was no reason why a court of equity should assist the plaintiff to recover the deeds also (see *Hunt v. Elmes*, *ante*, p. 537) or their value, whether by an action at law or otherwise, even assuming that the mortgagee could not make any use of them to recover the estate, and therefore he would be holding them to the vexation and hurt of the plaintiff without any profit to himself, and apart from that assumption there was still a possibility that the mortgagee by procuring the assignment of some term might be able to bring ejectment and recover possession, and the description of any one deed might contribute to defeat the title which he thus might maintain: *Wallwyn v. Lee*, 9 Ves. 24, pp. 27, 33—34, disapproving *Strode v. Blackburne*, 3 Ves. 221, where Lord Rosslyn, at p. 224, considered that the plea could only be used to defend the actual possession or perhaps the title to the possession: see *Wallwyn v. Lee*, p. 28.

Where an owner of a settled and unsettled estate has confounded them

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\* Qu. whether it was not because these cases established that a bill of discovery by the assignees of a bankrupt was useless for this purpose that special provisions were inserted in the bankruptcy acts (see *post*, p. 575) enabling persons to be examined concerning the bankrupt's property: see *Ex parte Caldecott*, Mont. pp. 61—62.

together and mortgaged them both to a person without any notice, it seems clear that the person claiming the settled estate cannot compel the mortgages to distinguish the two estates though he may be prevented from getting on with any process by reason of the boundaries being confused, though he must set out those of the whole estate which the mortgagor assumed to convey: see *Hare*, pp. 97—98: and *Wallwyn v. Lee*, p. 26, commenting on an ambiguous passage in *Strode v. Blackburne*, p. 225.

The consideration of the circumstances which equity considers necessary to place a person in the position of a purchaser for valuable consideration without notice is not within the province of discovery. One point however may be referred to as having been the subject of considerable dispute, namely how far this defence should prevail against a legal claim title or estate, or whether it was confined to cases where the defendant had the legal estate (or a better right to it than the plaintiff as suggested in *Wilks v. Bodington*, 2 Vern. 99: and see *Chambers v. Brownlow*, 2 Ridg. P. C. 422: and *Beames Eq. Pl.* 242).

All the authorities are reviewed by Lord St. Leonards in *Sugd. V. & P.* pp. 791—794. The opinion of the learned author is that the defence is good against a legal as well as an equitable claim. See also *Colyer v. Finch*, 5 H. of L. Ca. p. 920: *Penny v. Watts*, 2 D. G. & Sm. 501: *Heath v. Crealock*, L. R. 18 Eq. 215: *Pilcher v. Rawlins*, L. R. 7 Ch. 259.

It should however be noted that the real contention was not that the defence failed wherever the plaintiff in equity was possessed of a legal title or claim, for if it were so it could never be good to a bill of discovery in aid of a trial at law whereas there are many instances (*Rogers v. Seale*, 2 Free. 83 being the only case contra, as to which see *Jerrard v. Saunders*, 2 Ves. jun. p. 457: *Sugd. V. & P.* 792: *Hare*, p. 104) where bills of discovery have been filed for that purpose, and where the plea has been held valid: *Burlace v. Cook*, 2 Free. 24, bill of discovery by heir-at-law: *Basset v. Nosworthy*, *Finch*, 102, bill by heir-at-law against purchaser from devisee of ancestor for discovery of revocation of will and deeds and writings and for removal of terms to aid action at law: *Parker v. Blythmore*, 2 Eq. Ca. Ab. 79, bill for relief by person having a legal title: *Fagg's case*, *ante*, p. 536: and *Phillips v. Phillips*, 4 D. G. F. & J. pp. 216—217: and *Wallwyn v. Lee* referred to *ante*, p. 539: and *Hoare v. Parker* and other cases referred to *ante*, p. 539, bills of discovery for the purpose of bringing actions for trover or detinue: and generally see *Hare*, pp. 99—102 (and *Redes. Pl.* 199 where it is thus laid down, "where the courts of equity are called on to administer justice on grounds of equity against a legal title they allow a superior strength to the legal title when the rights of the parties are in conscience equal: and where a legal title may be enforced in a court of ordinary jurisdiction to the prejudice of an equitable title the courts of equity will refuse assistance to the legal against the equitable title where the rights in conscience are equal"). It was only in cases where courts of equity exercised a legal jurisdiction (not where application was made to its auxiliary jurisdiction: *Phillips v. Phillips*, p. 217) concurrently with the courts of law that it was said that equity in so assuming a concurrent jurisdiction professedly acts upon the legal right and therefore should proceed in analogy to the law where such a plea would not be looked at, and should regard the plea as inadmissible: see *Collins v. Archer*, 1 R. & M. pp. 288—289: *Roper, Husb. &*

Wife, Vol. I. p. 452: Storey, Eq. Jur. § 630: *Phillips v. Phillips*, pp. 216—217: for instance in a suit for dower, *Williams v. Lambe*, 3 B. C. C. 264: or in a suit for tithes, *Collins v. Archer*. This rule is distinct from that of refusing the benefit of the plea where the relief sought is purely equitable, or where the court is called upon to put the defendant in a worse position than he would otherwise be by compelling him to make disclosures that might expose his title to be defeated at law: see Hare, p. 103: Roper, Husb. & Wife, Vol. I. pp. 451—452.

In *Gomm v. Parrett*, 3 C. B. N. S. 47, an action of dower, the court refused to order production of a conveyance to the husband in the possession of a defendant pleading purchase for value without notice. The decision however was based upon the opinion of Lord St. Leonards that the defence was valid in every case, and was admittedly in the teeth of *Williams v. Lambe*.

The title of a purchaser for valuable consideration without notice has been said to be a shield to defend the possession of the purchaser not a sword to attack the possession of others. But where the mortgagee of a tenant for life in the position of a purchaser without notice brought ejectment against a person claiming under a settlement in remainder on the death of the tenant for life, and the latter filed a bill for discovery and production of the settlement and other title deeds and for an injunction, the mortgagee, denying all the circumstances charged as notice and stating the assignments under which he claimed, was protected. *Jerrard v. Saunders*, 2 Ves. jun. 454.

As to the right of the purchaser to discovery.

In Redes. Pl. 274, it is said that though the plaintiff may have a full title to the relief he prays and the defendant can set up no defence in bar of that title yet if the defendant has an equal claim to the protection of a court of equity to defend his possession as the plaintiff has to the assistance of the court to assert his right the court will not interpose on either side, and that this is particularly the case where the defendant claims under a purchase or mortgage for valuable consideration without notice which he may plead in bar: and see Hare, p. 89: and Dan. Ch. Pr. p. 583, citing *Patterson v. Slaughter*, Amb. 293.

## II. Other Instances of this Principle (see ante, p. 535).

As to a jointress.

A jointress was protected from discovery (see ante, pp. 537—538, as to what discovery) of her title to lands of which she was in possession as her jointure, unless the plaintiff was able to confirm her jointure, and not only offered to do so but in fact confirmed it: *Leach v. Trollope*, 2 Ves. 661: *Senhouse v. Earl*, *ibid.* 450: *Aston v. Aston*, 3 Atk. 301: *Petre v. Petre*, *ibid.* 511: *Chamberlain v. Knapp*, 1 Atk. 52: *Portsmouth v. Effingham*, 1 Ves. 30, 430, 434: Redes. Pl. 199, 279.

In *Aston v. Aston* the plaintiff claimed under the same deed as the jointress and therefore it was not necessary for him to confirm it.

In *Stephens v. Gaule*, 2 Vern. 700, a suit to redeem a mortgage against the widow of the mortgagee who claimed a jointure upon the property, she was protected from answering whether her husband had any other title than as mortgagee.

### As to voluntary conveyances.

In Fonbl. Eq. Vol. II. p. 492 (and see *Anon.* 2 Ch. Ca. 4) it is said that equity would not help the issue against a purchaser, referring to *Bunce v. Phillips*, 2 Vern. 50: *Kelly v. Berry*, *ibid.* 35: bills by remaindermen in tail to discover the deeds of entail against persons pleading discontinuance of the entail by voluntary conveyances: *Sherborne v. Clerk*, 1 Vern. 273: bill for discovery of the tenant to the præcipe on a voluntary conveyance: *Stapleton v. Sherrard*, 1 Vern. 212: bill to discover tenant of the freehold to bring formedon. But qu. as to the authority of some of these cases: see the note to *Stapleton v. Sherrard*: and qu. also whether the decisions rested on any particular principle. See as to the right of the heir in tail to discovery, *ante*, p. 274.

### As to a dowress.

The court would assist a dowress to ascertain the lands in respect of which her dower arose: *Dorner v. Fortescue*, 3 Atk. p. 130: and generally would enforce discovery in her favour against the heir: *Curtis v. Curtis*, 2 B. C. C. p. 631: and see generally as to the position of a dowress *Dudley v. Ward*, Prec. in Ch. 241. See also *Gomm v. Parrett* and *Williams v. Lambe*, *ante*, p. 541.

## III. As to a Mortgagee where his Mortgage is admitted.

A mortgagee whose mortgage is impeached is in the same position as any other person claiming under a document which is impeached: see *ante*, p. 256:\* he may be in the position of a purchaser for valuable consideration without notice: see *ante*, p. 535.

By sub-section (1) of section 16 of the Conveyancing Act, 1881, "A mortgagor as long as his right to redeem subsists shall by virtue of this act be entitled from time to time at reasonable times on his request and at his own cost and on payment of the mortgagee's costs and expenses in this behalf to inspect and make copies or abstracts of or extracts from

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\* See the following cases there cited pp. 259—261: *Neate v. Latimer*: *Howard v. Robinson*: *Duncombe v. Davis*: *Republic of Costa Rica v. Erlanger*: *Dendy v. Cross*: *Jones v. Jones*: *Addison v. Walker*: *Phillips v. Evans*: *Cannock v. Jauncey*: *Smith v. Barnes*: and *Owen v. Nickson*, cited *ante*, p. 267.



the documents of title relating to \* the mortgaged property in the custody or power of the mortgagee." By sub-section (2), "This section applies only to mortgages made after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary."

As this provision applies only to mortgages made after the commencement of the act it is necessary to consider the practice as it was before the act.

In *Chichester v. Donegal*, L. R. 5 Ch. p. 502, the position of the mortgagee admitting the title of the mortgagor and his right to redeem is thus defined: "The rule of the court right or wrong is that if a mortgagor executes a mortgage and hands over the deeds he cannot see them after the mortgage has become absolute without paying the principal interest and costs." And again on the same page: "I take the rule to be that as between mortgagor and mortgagee, the right time for redemption being passed (before the time the deed is the common property of mortgagor and mortgagee, it should seem: see Wigr. Pl. 374) and the mortgage not being impugned (see *ante*), if the plaintiff wants to see the mortgage deed,† his title to redeem being admitted (see *Howard v. Robinson*, 4 Drew. p. 526), he must pay the principal interest and costs or go on to get his redemption decree." So the general rule is admitted in *Jones v. Jones*,

\* If this is meant to include the mortgage deed itself the intention is not very happily expressed.

† The mortgage deed itself is within the rule: *Howard v. Robinson*, 4 Dr. p. 526: *Freeman v. Butler*, 33 Beav. 289: and see *Anon.* W. N. 76, p. 23, referred to *post*, p. 545. It was the opinion of Stuart, V. C. see *Patch v. Ward*, L. R. 1 Eq. p. 439, that the rule did not extend to the mortgage deed itself as to which different considerations prevailed, for it was the mortgage deed which conveyed the property by way of pledge and which contained the proviso for redemption by virtue of which the mortgagor was entitled to redeem the property, and therefore it was as much the evidence of the mortgagor's title to redeem as of the mortgagee's estate. And so in *Ex parte Caldecott*, Mont. pp. 58—59, and 2 Ca. & Op. 52—53, it is said that the mortgage deed must always be open to inspection that the mortgagor may know his right to redeem: (but see *post*, p. 545, as to discovery of this). It may be pointed out that in the cases now under consideration the mortgagor's title to redeem is admitted: where it is not admitted, or where the mortgagor makes a special case, as where the deed to some extent can be shown to support the mortgagor's case, see *Howard v. Robinson*, p. 526, other considerations have a place: see *ante*. The mortgagor cannot have a copy of it: *Brown v. Lockhart*, 10 Sim. pp. 434, 435, disapproving *Anon.* Mos. 246. See as to discovery of certain of its contents *post*, p. 545.



Kay, App. p. 9 : *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. p. 44 : *Neate v. Latimer*, 2 Y. & C. p. 262 : *Senhouse v. Earl*, 2 Ves. 450 : *Cannock v. Jauncey*, 1 Dr. p. 507 : *Johnson v. Tucker*, 11 Jur. 382 : *Pindar v. Smith*, 6 Madd. p. 49. Nor need he produce drafts or copies of the deeds, for he is not bound to show his title : *Bycroft v. Sibel*, 1 W. R. 96 : not even of the mortgage deed : *Brown v. Lockhart* : \* nor need he answer interrogatories inquiring into the particulars or contents of the deeds : see *Chichester v. Donegal*, *post*, p. 545 : except to the extent pointed out *post*, p. 545, in respect of the amount due and the property comprised in it. Where part of a first mortgagee's security consisted of bills and notes their production was ordered : *Gibson v. Hewett*, 9 Beav. 293. See as to a deed of transfer *Lewes v. Davies*, *post*, p. 546.

The rule was said in *Bentinck v. Willink*, 2 Ha. p. 8, to depend not on any peculiarities of system but to be founded on principles of abstract justice : and in *Howard v. Robinson*, 4 Dr. 526, to stand not on special circumstances, but to be a case within the general rule.

It is as in the case of any purchaser for valuable consideration without notice (see *ante*, p. 538) that no advantage may be taken either by the applicant (under the pretence of repayment) or some other persons of any flaw or invalidity in the deeds : see *Senhouse v. Earl*, 2 Ves. 450 : *Schlenker v. Moxy*, 1 C. & P. 178, p. 179 : so as to defeat the security : see 2 Ca. & Op. pp. 52—53 : *Ex parte Caldecott* : Mont. pp. 58—59.

The same privilege it seems obtains in the case of a mere lien on deeds : *Griffeth v. Ricketts*, 14 Jur. 326 : or of an equitable deposit : *Schlenker v. Moxy*. See as to a memorandum of deposit (but not admitted, see *ante*, p. 542) a common law case of *Owen v. Nickson*, *ante*, p. 267.

The money must be actually paid principal and interest : *Brown v. Lockhart*, 10 Sim. p. 425 : and costs : *Chichester v. Donegal*, pp. 498, 502 : the amount of his claim : *Bentinck v. Willink*, 2 Ha. p. 8 : *Postlethwaite v. Bligh*, 2 Sw. pp. 251—

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\* See note †, *ante*, p. 543.

252: not other debts: see *Cannock v. Jauncey*, cited *ante*, p. 262. He may put the deeds in a box and sit upon them till the money is actually put into his hands: per Lord Kenyon, see *Sparke v. Montriau*, 1 Y. & C. p. 107.

It makes no difference that the mortgagor has actually given the mortgagee notice of his intention to pay off the mortgage and requires inspection in order to raise money for this purpose: *Damer v. Portarlinton*, 15 Sim. 380: *Browne v. Lockhart*, 10 Sim. p. 425. A mortgagee is not bound to show his mortgage deeds to a person contracting for the purchase of the estate. He is entitled to say to the intending purchaser that if he choose to take his chance of the title he may on payment of the mortgage money have a conveyance: *Postlethwaite v. Bligh*, 2 Sim. p. 251. Where the mortgagee is party to a suit and has consented to a decree for sale he cannot refuse to deposit the deeds in chambers for the purpose of completing the sale: *Livesey v. Harding*, 1 Beav. 343: *Anon. Mos.* 246. On being paid off, the mortgagee must if required make an affidavit of the documents in his possession relating to the mortgaged property at the mortgagor's expense: see *Weeks v. Stourton*, 13 W. R. 489.

### The mortgagee must give certain discovery.

In *Beavan v. Cook*, 17 W. R. 872, an incumbrancer without notice of the defendant's prior incumbrance bringing a suit for redemption and foreclosure (and so any person bringing such a suit, see the judgment) was held entitled to discovery from him of the dates and natures of his securities, the nature of the property comprised in them, the amounts claimed to be due, and the rates of interest reserved: (qu. as to *Addison v. Walker*, cited *ante*, p. 538, where however the mortgage was impeached). Where executors of the mortgagor in an action of ejectment against them by the mortgagees applied for inspection under Ord. XXXI. r. 14, of the mortgage deed referred to in the statement of claim, but only for the purpose of ascertaining particulars in order to redeem the mortgage, no order was made on the plaintiff's undertaking to give the amount of principal interest and costs and particulars of subsequent incumbrances: *Anon. W. N.* 76, p. 23.

A subsequent incumbrancer is entitled to know what (but not their values) securities are held by a prior incumbrancer for his debt and the amount due (not minute details, p. 617), otherwise he cannot know whether it is worth his while to redeem him: *West of England Bank v. Nicholls*, 6 Ch. D. 613: and see *Chichester v. Donegal*, L. R. 5 Ch. p. 499. So a person claiming to be a surety as to the securities held by the creditor: *Bridgewater v. De Winton*, 9 Jur. N. S. 1270.

So discovery of the names of incumbrancers must be given so that if necessary they may be made parties: see *ante*, p. 19.

The general state of the accounts must it was held be given, though not a detailed statement of them (see *ante*, p. 125, as to discovery of accounts generally), in an action for redemption where an account with rests was sought to be charged against a mortgagee in possession: *Elmer v. Creasy*, p. 73 (cited *ante*, p. 125): see also *Freeman v. Butler* and *Johnson v. Tucker*, *post*, p. 546. Where in a suit to redeem it was charged that the amount due was not truly stated in the mortgage deed it was held that something more specific than the general total must be given: *Bridgewater v. De Winton*: and see *Neate v. Latimer*, *ante*, p. 259.

In *Chichester v. Donegal*, pp. 498—499, it may be noted that the defendants (see *post*, p. 546) submitted to discover the nature of the mortgage, that is to say whether it was executed under a power reserved to the mortgagor, though on other points they successfully appealed.

## Special cases.

A person claiming through the mortgagor is in no better position than the mortgagor: *Chichester v. Donegal*, L. R. 5 Ch. 497: though he may be ignorant of the property comprised in the mortgage, the rate of interest and time of payment: *Brown v. Lockhart*, 10 Sim. 420: (but as to discovery of these particulars see *ante*). In *Chichester v. Donegal* the Court of Appeal reversing the decision of James, V. C. in the court below held that the mortgagee was not bound to answer interrogatories inquiring into the date particulars and contents of a deed (qu. whether as to its existence and whether the mortgagee claimed under it, see the case) under which the plaintiffs claimed and in pursuance of a paramount power in which the mortgage had been made, nor to produce the deed itself, James, V. C. considering that to the extent to which the deed limited an interest to them they had an interest of the nature of property: (see further as to the case in connection with this point *ante*, p. 278). See *post* as to a lessor.

A subsequent mortgagee has no right to see the prior mortgagee's mortgage deed: *Howard v. Robinson*, 4 Dr. pp. 526—527: but see an exception suggested in *Neate v. Latimer*, *ante*, p. 259.

There is no rule giving a prior mortgagee a right to see a subsequent mortgagee's mortgage deed: *Howard v. Robinson*, p. 527.

A lessor has been held entitled to inspection of the lease in the hands of a mortgagee of the lease: see *Balls v. Margrave*, cited *ante*, p. 203: and *Doe d. v. Roe*, cited *ante*, p. 270. A lessor however does not claim through the lessee, and is therefore not within the principles of *Chichester v. Donegal*, *ante*.

Where the mortgage had been transferred the transferee was held not bound to produce the deed of transfer, for it was his title deed: *Lewes v. Davies*, 17 Jur. 253. If the mortgagor is in any doubt as to the validity of the transfer he should make the original mortgagee a party and get discovery from him: see *Lewes v. Davies*: and generally as to discovery of parties see *ante*, p. 19. So in *Gill v. Eyton*, 7 Beav. 155, production of the transfer was refused, for it was not impeached (as to which see *ante*, p. 542), though it was alleged that the transfer had been made for vexatious purposes while the suit was pending.

Where a tenant in common has mortgaged his share to the other tenant in common he loses his right (see *ante*, p. 276) to see the deeds: *Edmonds v. Foley*, 30 Beav. 283.

Where an executor and trustee was also mortgagee of part of the testator's estate he was held bound in an administration action to produce accounts relating to the mortgage, but not the mortgage deed and title deeds: *Freeman v. Butler*, 33 Beav. 289: so where the cestui que trust has himself mortgaged the trust property to the trustee: *Johnson v. Tucker*, 11 Jur. 382.

See as to cases where the mortgagee is the mortgagor's solicitor *ante*, p. 260.

See as to production by a mortgagee under section 197 of the Bankruptcy Act, 1869, *Re Marks*, L. R. 1 Ch. 429: *Ex parte Tatton*, 17 Ch. D. 512, and under an old act, *Ex parte Caldecott*, Mont. 55: and see *post*, p. 575.

## CHAPTER V.

## DISCOVERY INVOLVING DISCLOSURES INJURIOUS TO PUBLIC INTERESTS.

PUBLIC official documents are generally protected from disclosure (whether by actual production or in answer to interrogatories: *Fitzgibbon v. Greer*, Ir. R. 9 C. L. 295) on grounds of public policy and of the prejudice to the public interests by the disclosure: *Wadeer v. E. I. Co.* 8 D. G. M. & G. p. 191: *Moodalay v. Morton*, 1 B. C. C. p. 471. If it were not so, it would be impossible to communicate freely: *Smith v. E. I. Co.* 1 Ph. p. 55: *The Bellerophon*, 44 L. J. Adm. 5. The principles upon which justice is administered in civil courts, whether between the sovereign and a subject or between subject and subject, preclude the possibility of the interference of the court for the purpose of disclosure of state papers despatches minutes or documents of any such description which relate to the carrying on of the government and are connected with the transaction of public affairs: *Wadeer v. E. I. Co.* p. 187. If the production of a state paper would be injurious to the public service the general public interest must be considered paramount to the individual interest of a suitor in a court of justice: *Beatson v. Skene*, 5 H. & N. p. 853. All official correspondence is not privileged. It is only so under particular and special circumstances, as where to disclose it would infringe the policy of an act of parliament and would be injurious to the public interests: *Smith v. E. I. Co.* pp. 54, 55. And the communication must be made in pursuance of a public duty: *Blake v. Pulford*, 1 M. & R. 198 (where protection was refused to a letter written by a private individual to the Postmaster-General complaining of the conduct of a guard towards a passenger).

The head or the secretary of the particular department must state on oath that the production of the documents will in his

opinion be injurious to the public service: *The Bellerophon*, 44 L. J. Adm. 5: *Kain v. Farrer*, 37 L. T. 469: *Beatson v. Skene*, 5 H. & N. p. 583. It is not sufficient for the party to object to produce all documents in his official custody on the ground of public policy, and to refuse to state anything further with respect to them: the mind of the proper person must be brought to bear on the question: he must go through the documents and consider them: *Kain v. Farrer* (Board of Trade).

A report made in pursuance of his duty by the commanding officer of H.M. *Bellerophon* to the Lords of the Admiralty on the subject of a collision with another ship was protected in an action by the owners of the other ship for damages against the admiral and captain of the *Bellerophon* (the action being defended on behalf of the Lords of the Admiralty), the secretary to the Admiralty stating in an affidavit that it would be prejudicial to the public service to allow inspection of such reports by litigants in proceedings at law in respect of the matters therein reported, and that therefore on behalf of the Admiralty he objected to produce them: *The Bellerophon*, 44 L. J. Adm. 5.

In reference to copies of depositions relating to the circumstances of the collision made by the master and crew of the plaintiffs' ship to the Board of Trade under the Merchant Shipping Act, 1854, sect. 432, and an application by the defendants for inspection, the Board of Trade having refused to furnish them with copies on the ground that no depositions had been made by the master and crew of their own ship, which was a foreign ship and therefore not within the section, Butt, J. said "I am not at all sure that the Board of Trade were not right in refusing to supply copies. I do not know their exact nature but I know that there are some statements taken by officers of the Board of Trade for statistical purposes, and I think it undesirable that masters should be examined for these purposes and then that what they have disclosed should be shown to anyone who desires to see it. I am not therefore disposed to go out of my way for the purpose of giving publicity to these documents;" the copies were however (see *ante*, p. 395) protected on grounds of professional privilege: *The Palermo*, 9 P. D. 6.

A copy letter written by the railway company to the Board of Trade on the subject of a railway accident in pursuance of 3 & 4 Vict. c. 97, s. 3, was ordered to be produced; but no protection seems to have been claimed for it on grounds of public policy: *Woolley v. N. L. R. Co.* L. R. 4 C. P. 602. So letters written by the lunacy commissioners to the keeper of a private asylum respecting a person confined there, in an action by the latter against the former: *Hill v. Philp*, 7 Exch. 235. So a statement laid before a commissioner at his request on application for his confirmation of creditors' resolutions: *Flight v. Robinson*, 8 Beav. p. 40.

The books of government stock at the Bank of England are not privileged from inspection on public grounds: *Heslop v. Bank of England*, 6 Sim. 192.

Other documents which have been protected are: reports of military commission of inquiry: *Home v. Bentinck*, 2 B. & B. 130: and see *Dawkins v. Rokeby*, L. R. 8 Q. B. 255: communication by justice of peace to the Lords Commissioners of the Great Seal concerning another justice of the peace: *Fitzgibbon v. Greer*, 9 Ir. R. C. L. 295: official communications between a colonial governor and his attorney general: *Wyatt v. Gore*, Holt, N. P. 299: and a military officer under his authority: *Cooke v. Maxwell*, 2 Stark. 193: reports of inspector of prisons: *McElveney v. Connellan*, 17 Ir. L. R. 55: between the directors of the E. I. Co. and the Commissioners of Affairs of India under 3 & 4 Will. 4, c. 85: *Smith v. E. I. Co.* 1 Ph. 50: political

communications in reference to the political duties of the E. I. Co.: *Wadeer v. E. I. Co.* 8 D. G. M. & G. 182: communications between an agent of the government in one of the colonies and the Secretary of State: *Anderson v. Hamilton*, 2 B. & B. 156, n.: letter from merchant to the Commissioners of Customs on revenue business: *Black v. Holmes*, Fox & Sm. 28.

A clerk to the commissioners was as witness ordered to produce a book containing the defendant's appointment as tax collector, for though he had taken an oath not to disclose anything he should learn respecting the property tax, the giving it in evidence in a court of justice was an implied exception: *Lee v. Birrell*, 3 Campb. 337: and see *ante*, p. 302.

## BOOK III.

### MISCELLANEOUS.



## CHAPTER I.

### DISCOVERY IN ACTIONS FOR INFRINGEMENT OF PATENTS OR TRADE MARKS.

SEE as to inspection of premises machinery processes, &c. in such actions, *post*, Ch. VI. Sect. II. : and as to the provisions to that effect in the Merchandise Marks Act, *post*, p. 556.

#### I. *Statutory Particulars and Discovery in the Nature of Statutory Particulars.*

(1) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or the judge at any subsequent time, particulars of the breaches complained of. (2) The defendant must deliver with his statement of defence, or by order of the court or a judge at any subsequent time, particulars of any objections on which he relies in support thereof. (3) If the defendant disputes the validity of the patent the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him. (4) At the hearing no evidence shall, except by leave of the court or a judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered. (5) Particulars delivered may be from time to time amended by leave of the court or a judge. (6) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and defendant: and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case—46 & 47 Vict. c. 57, s. 29.

This act repeals the 15 & 16 Vict. c. 83, under section 41 of which similar provision was made for the delivery of particulars in common law actions for infringement of patents. This section differs in some respects from that in the recent act: but the only difference which it is here material to notice is that under that section the defendant was bound to state "the place or places at or in which and in what manner the invention is alleged," &c. It is not conceived that the present sub-section (3) is intended to have any narrower scope, so as for instance to exclude the necessity of giving the names and addresses of the persons using or publishing the invention: see *post*.



The object of this provision is that each party may have full fair and distinct notice of the case to be made against him, and, as to the plaintiff, that he may not be surprised by production at the trial of evidence of prior user or publication of which he has not had notice, and also to enable him to abandon the contest if from the specified particulars it is hopeless: *Daw v. Eley*, L. R. 1 Eq. p. 41: *Curtis v. Platt*, 8 L. T. 657: *Needham v. Oxley*, 1 H. & M. 248.

Although an order for particulars against a defendant was (following the words of the section of the old act, see *ante*) in terms confined to "the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent": *Flower v. Lloyd*, 25 W. R. 17: yet under this form of order the defendant was according to modern practice bound to give fair information as to the persons by whom it had been so used or published, though not necessarily the names and addresses of every person: *Flower v. Lloyd*, 20 S. J. 860 (before Field, J. on the amended objections under the previous order: and cited and followed in *Birch v. Mather*, *post*, p. 552), where it was held insufficient to say that it had been used by three persons (giving their names and addresses) and other persons in Birmingham and London respectively, for the defendant must know the persons: see further *Morgan v. Fuller*, L. R. 2 Eq. 297: *Plimpton v. Spiller*, 20 S. J. 859, as to what are sufficient particulars in this and other respects: and see *Finnegan v. James*, and *Crossley v. Tomey*, *post*. In *Penn v. Bibby*, L. R. 1 Eq. 548, the defendant was ordered to give amended particulars stating the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which, &c.: and so in *Morgan v. Fuller*: see also *Kuhliger v. Bailey*, cited *ante*, p. 457.

In equity particulars were ordered where an issue was directed: *Morgan v. Fuller*: *Penn v. Bibby*: *Finnegan v. James*: and ultimately it was considered that the practice ought to be assimilated to that at common law under this section, and that the plaintiff ought either to state the particulars in his bill, or, if they were long, furnish them with

the bill, and the defendant insert them in his answer: Jessel, M. R. in *Finnegan v. James*, L. R. 19 Eq. 72: *Crossley v. Tomey*, 2 Ch. D. p. 538: and see *post* as to obtaining this information by means of interrogatories.

The practice as to furnishing particulars is now of course the same in both divisions: see for instance *Birch v. Mather*, *post*, where the defendant delivered particulars with his defence: and see the recent act, *ante*.

It is also legitimate in a proper case to obtain this information from the defendant by properly worded interrogatories, where it has not been disclosed by way of particulars: *Birch v. Mather*, 22 Ch. D. 629: *Finnegan v. James*, L. R. 19 Eq. 72: *Crossley v. Tomey*, 2 Ch. D. 533: but qu. whether if the party offer to give the information by way of particulars, he would under the new rules at all events be compelled to give it by way of answers to interrogatories: see *ante*, p. 91, though otherwise before the Jud. Act: *Finnegan v. James*: and see also *Crossley v. Tomey*: see also generally as to particulars under the old rules of the Jud. Act *ante*, p. 451. In reference to the objection that the defendant would not be able to adduce at the hearing any other instances of prior user Jessel, M. R. in *Finnegan v. James*, p. 73, said that if any other instances were discovered after answer he would be allowed to set them up at the trial on giving the plaintiff proper notice: and see *Crossley v. Tomey*, p. 539: and see generally as to this point in other actions *ante*, p. 452: and see as to amending particulars the section of the act *ante*: *Penn v. Bibby*, L. R. 1 Eq. 548: *Daw v. Eley*, *ibid.* 38: *Edison Telephone Co. v. India Rubber Co.* 17 Ch. D. 137: *Wilson v. Gann*, 23 W. R. 546.

In *Birch v. Mather*, 22 Ch. D. 629, where the defendant had delivered with his defence particulars of objections, including a statement that the plaintiff's alleged invention had been used prior to the date of the patent at certain works (naming them), the plaintiff was allowed after the close of the pleadings to interrogate as to the matters stated in the defendant's particulars, including the names and present addresses of the persons alleged to have used the invention at those works. In *Finnegan v. James* and *Crossley v. Tomey* discovery of a similar nature was enforced, that is to say, the names and addresses of the persons (some of them at all events: see *ante* as to instances subsequently discovered) by whom, the places where, the dates at, and the manner in which, &c.

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## II. *Discovery other than that in the Nature of Statutory Particulars.*

### (a) *From the Defendant.*

In earlier cases in equity interrogatories asking for information such as must according to the interpretation put upon the act have been given at common law in the form of particulars were regarded as improper, as inquiring into the defendant's case: *Bovill v. Goodier*, L. R. 2 Eq. 459: *Daw v. Eley*, 2 H. & M. 725: no reference apparently being made to this act.

In *Bovill v. Goodier* Lord Hatherley held that the defendant was not bound to answer who was the true and first inventor or give instances of prior user, for that the plaintiff was not entitled to inquire generally into the way the defendant shaped his case in order to find out whether some of the persons alleged by him to have used the process prior to the patent were those against whom he had succeeded in other suits, though he might have asked if his process was the same as that used by some person specifically named. In *Daw v. Eley* the defendant was protected from answering what goods had been sold or to whom or what machines had been used by him similar to those of the plaintiff. And generally Lord Hatherley considered that the plaintiff had no right to discovery of the particulars on which the defendant intended to rely as evidence of prior user, and that he must wait until the defendant adduced this evidence at the hearing and then contradict it, and further that it was seeking to discover the names of the defendant's witnesses.

All discovery relating to the defendant's trade, such as the names of his customers, receipts, prices, profits, &c. unless it is clearly material to the actual determination of the questions which will arise at the trial, or, according to the expressions used in the rules, see *ante*, p. 25, necessary or material at that stage, will be refused (or rather postponed until after decree if the plaintiff should succeed in getting a decree, see *post*, p. 567) in accordance with the principles discussed *ante*, Bk. I. Chap. II.: discovery of this nature being obviously prejudicial and only to be justified by its manifest materiality: see *ante*, pp. 298, 302.

In *Carver v. Pinto Leite*, L. R. 7 Ch. 90 (action for infringement of trade marks) the defendants had sealed up portions of entries in books, and of other documents as not relating to the matters in question, or whereby the plaintiffs could gather any information which would help them to establish their claim: they were ordered to unseal the marks used on their goods, and any directions relating to them, and the towns to which the goods were sent; but not the names of their customers or the prices, for those were matters which concerned only their trade and a discovery of them would not aid the plaintiffs in establishing their title to the marks, nor the names of the manufacturers

of the goods. Discovery as to the machines in the defendant's possession, as to the articles manufactured, and other matters was refused in *De La Rue v. Dickinson*, 3 K. & J. 388, as being unnecessary for the actual determination of the matter in question, namely the fact of infringement, though if the plaintiff got a decree he would then be entitled to this discovery: see on the other hand *Swinborne v. Nelson*, *ante*, p. 33, where the rule of a full answer was applied to discovery of this nature. In *Howe v. McKernan*, 30 Beav. 547, the plaintiff charging that the defendant had sold under the plaintiff's name sewing machines not manufactured by him, the defendant was held bound (partly under the technical rule of a full answer) to disclose the names of the persons to whom and dates (and prices and other matters) at which he had sold any machine alleged to be made in infringement of the patent (not merely those sold as Howe's machines, for it was material for the plaintiff to test the truth of the defendant's statement as to whether any of the machines sold by him were or were not Howe's machines); in *Simpson v. Charlesworth*, 14 L. T. 699, an answer to oppressive interrogatories inquiring into the defendant's process and trade was refused to be enforced: in *Crossley v. Stewart*, 1 N. R. 426, accounts of royalties and other payments received by the defendant, and from whom received, were ordered, for they might be useful in proving infringement: in *Young v. White*, 17 Beav. 532, where the only issue was whether the plaintiff was or was not the true inventor, the defendant was protected from discovering his own process, for it was immaterial to that issue: see also *Rolls v. Isaacs*, W. N. 78, p. 37, where, plaintiff and defendant each claiming under a patent of his own, the defendant was protected from discovery relating to his own process and the application of it to ships: *Renard v. Levinstein*, 3 N. R. 665, where the defendant, denying the alleged infringement and stating that his trade depended on keeping his process secret, was ordered to discover whether he made use of certain materials but not the proportions in which he used them, and also whether he used any other materials but not what materials: but a defendant has been held bound to state (so far as he can, see *post*, p. 555) in what particulars his own process differed from that described in the plaintiff's specification: *Crossley v. Tomey*, 2 Ch. D. 533: and see *Hoffmann v. Postil*, *post*, p. 555.

As to discovery after and for the purpose of working out the decree. (See also generally as to discovery for this purpose *post*, Chapter IV.)

In prosecuting an inquiry for damages the plaintiff is entitled to the fullest possible discovery: Bacon, V.-C. in *Murray v. Clayton*, L. R. 15 Eq. p. 118. After decree for an injunction restraining infringement and for an inquiry as to damages the plaintiff was held entitled to an affidavit from the defendant stating the number of machines made since the date of the patent and also the names of the persons to whom sold or for whom purchased, for (in reference to the objection that the plaintiff would proceed against these persons and thereby the defendant's business would be ruined) he could not excuse himself or avoid the discovery because of any consequence which might ensue from his wrong doing: *ibid.* 115, pp. 119—120: (and see *Tetley v. Easton*, *ante*, p. 307).

See also *De La Rue v. Dickinson*, 3 K. & J. 388 (cited *ante*: *Saxby v. Easterbrook*, *post*, p. 569: *Stephens v. Brett*, 10 L. T. 231, suit to restrain the piracy of a literary work, where the bill sought directions for ascertaining the matter pirated and delivery up of the copies of the publication containing it, and where a complete decree (see *ante*, p. 21) could not be given without discovery of these matters: *Leather Cloth Co. v. Hirschfeld*, 1 H. & M. p. 297, where a decree having been made for an injunction restraining the use of plaintiff's trade mark with an inquiry as to damages, the defendant in cross

examination on his affidavit made on the inquiry was held bound to give the names of the customers to whom he had sold articles bearing the trade mark, and if he could not distinguish between such persons and the purchasers of articles not bearing such mark he must give the names of all his customers in order that the plaintiff might investigate the matter for himself, by analogy to the right of a plaintiff to amend his bill and administer interrogatories of that character.

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(b) *From the Plaintiff*: see *ante*, p. 553.

The defendant's case being to prove the invalidity of the plaintiff's patent (*Daw v. Eley*, cited *ante*, p. 553, where it was the plaintiff who was seeking discovery, being distinguished on this ground: but see *ante*, pp. 467, 498, as to the true nature of the difference between the position of the plaintiff and defendant in this respect) he was held entitled to interrogate the plaintiff in detail as to the differences between his process as compared with that of previous patentees, in order to show that there were no differences, and in particular for this purpose to interrogate as to the specifications of these patentees, for the questions did not cease to be questions of fact because they referred to the specifications or other written documents (see further as to this point *ante*, p. 115), and also as to the particulars of infringement, though in this case it was held sufficient to refer to the particulars set out in the bill: *Hoffmann v. Postil*, L. R. 4 Ch. 673. See also *Benbow v. Low*, cited *ante*, p. 453.

A plaintiff has been ordered to answer as to the terms of a compromise in another action as being material: *Betts v. Neilson*, W. N. 66, p. 170: and see generally as to discovery of this nature *ante*, p. 186: but not as to the alleged failure of proceedings abroad where it was immaterial: *Hoffmann v. Postil*, L. R. 4 Ch. 673.

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It was held sufficient in *Crossley v. Tomey* to say "I cannot show in what manner the two articles differ without ocular demonstration." See a similar answer in *Smith v. G. W. R. Co.* cited *post*, p. 581, and the order there made.

The following provisions of the Merchandise Marks Act, 25 & 26 Vict. c. 88, may be noted :—

By section 6 any person selling or exposing for sale, &c. any chattels or articles with any forged or counterfeited trade mark or with the trade mark of any other person used without authority or excuse, &c. is bound within forty-eight hours after delivery of a demand in writing to give full information of the name and address of the person from whom he obtained them and of the time when he obtained them and may be proceeded against before a justice of the peace in case of refusal.

See section 21 providing for inspection of processes, articles, &c. *post*, p. 582.

By section 11 provision is made for compelling discovery and evidence to be given in spite of the penalties imposed by the act : (see further as to provisions of a similar nature *ante*, p. 329).

In a recent case, *Orr v. Diaper*, 4 Ch. D. 92, owners of a trade mark were held entitled to bring an action for discovery against shippers of articles with a counterfeited trade-mark to discover the names of the consignors : see further *post*, p. 609, as to this case.

## CHAPTER II.

## ACTIONS ON MARINE POLICIES AGAINST UNDERWRITERS.

UNDERWRITERS of marine policies have from early times been exceptionally favoured in the matter of discovery. "Long before the Jud. Acts the peculiarity of insurance business had given rise to a practice both in chancery and at common law of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad, and when the ship is entirely under the control of the assured:" Brett, L. J. in *China Steamship Co. v. Commercial Assurance Co.* 8 Q. B. D. p. 145: see also Jessel, M. R. *ibid.* p. 144: *Rayner v. Ritson*, 6 B. & S. 888: *Daniel v. Bond*, 9 C. B. N. S. pp. 723—724 (where it was said that in this particular there was no distinction between the underwriters and any other person suing the shipowner, see this case further cited *ante*, p. 185), and the cases there, p. 724, cited: and *Goldschmidt v. Marryat*, 1 Campb. 559. Nor is the discovery confined to the circumstances attending the loss. "Nothing is more difficult to ascertain and nothing more dangerous than to limit the rights of underwriters to discovery. It has been considered at all times and in all countries that in cases of this nature the underwriters are entitled to a discovery not only of all the circumstances attending the original contract (and see *Daniel v. Bond*, p. 723), but to the whole history of the adventure and loss:" *Janson v. Solarte*, 2 Y. & C. p. 136: and to an inspection of everything relating to the particular transaction in dispute: *ibid.* p. 138.

In an action against them for loss of a ship a plaintiff must, whether under the old common law practice or under the C. L. P. Act, 1851, have produced everything (such as letters between the plaintiff shipowner and the master of the ship both before and after the loss) that might throw a light upon the



part of the transaction in which both parties were interested: *Rayner v. Ritson*.

If it were suggested in answer to a claim in respect of goods alleged to have been purchased, shipped, and lost, that no such goods were purchased or shipped, and that the plaintiffs were not in a position to purchase them, and generally the bona fides of the transaction were impeached, it might under some circumstances be admissible to interrogate for the purpose of showing that the plaintiffs had not sufficient capital or credit to make such purchase, and in any case to have inspection of entries in their books relating to the purchase and the value of the goods, and of correspondence with the alleged consignees: see *Janson v. Solarte*, pp. 136—139.

Further, the right of the underwriters extends to discovery and production of any documents which are in the possession of any persons interested (that is, persons on the same side as the plaintiffs: *China, &c. Co. v. Commercial, &c. Co.* p. 145), although these persons are not parties to the action. The contract of insurance is made in peculiar terms on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters: Brett, L. J. in *China Steamship Co. v. Commercial Assurance Co.* 8 Q. B. D. 145. The practice therefore arose at common law of ordering an affidavit to be made in such a form as to include documents in the possession of these persons: and it was held in *West of England, &c. Bank v. Canton Insurance Co.* 2 Ex. D. 472, that this practice survived the Jud. Act; and subsequently (1880) a form of order was issued, being that now incorporated in Appendix K. to the Jud. Act, No. 19,\* leaving

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\* Order for Production (Underwriters). (App. K. No. 19.)

Upon hearing                      and upon reading the affidavit of                      filed the day of                      18                      , and

It is ordered that the                      do produce and show to the                      upon oath all insurance slips, policies, letters of instruction or other orders for effecting such slips or policies, or relating to the insurance or the subject-matter of the insurance on the ship                      or the cargo on board thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship                      the cargo on board thereof and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all pro-

however a blank for the persons who are to make the discovery and production: this blank may be filled up generally thus "the plaintiffs and all persons interested in these proceedings and in the insurance the subject of this action:" or specially, as in *West of England, &c. Bank v. Canton Insurance Co.* where the plaintiffs were mortgagees of 32/64ths of the ship, the ship having been sailed by the mortgagors who were managing owners and were now dead, and the order directed that "the plaintiffs, the mortgagors or their representatives and all persons interested," &c. It will be noticed that this form does not contain a direction to "account for all such documents as were once but are not now in their or any of their possession, custody or power as did the form used in both of the above-mentioned cases.

The form of order directs a stay of proceedings: but the only object of this stay is to put the plaintiffs under the necessity of making every effort to get possession of the documents where they are not under their own control: it is not an absolute stay: if the plaintiffs produce all that they can get and show that they have bonâ fide done all they can to discover and get the other documents, if any, the stay will be taken off, and they will not be prejudiced: *West of England, &c. Bank v. Canton Insurance Co.* pp. 474—475: *China, &c. Co. v. Commercial, &c. Co.* pp. 144, 145—146.

Where the other parties interested are out of the jurisdiction and not under the plaintiffs' control it seems that no stay will be directed: *Fraser v. Burrows*, 2 Q. B. D. 624, where the plaintiffs were insurance brokers who had insured as agents for the owner of the vessel and cargo who was in Prince Edward's Island.

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tests, surveys, log books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence papers and writings (whether originals, duplicates or copies respectively), which now are in the custody, possession or power of the                      his brokers, solicitors or agents, in any way relating or referring to the matters in question in this action, with liberty for the                      to inspect and take copies of or extracts from the same or any of them, and that in the meantime all further proceedings be stayed, and that the costs of this application be

Dated the                      day of                      18                      .

No affidavit is necessary on the application : *China, &c. Co. v. Commercial, &c. Co.* : though see the form in the note *ante*.

No deposit for costs is necessary : *Law v. Budd*, W. N. 83, p. 166, *post*, p. 595.

See as to discovery in favour of underwriters in cases of indictable frauds *ante*, p. 340.

As to discovery by underwriters see *Kellock v. Home and Colonial Insurance Co.* referred to *ante*, p. 515.

## CHAPTER III.

## THE PROBATE, DIVORCE AND ADMIRALTY DIVISION.

I. *Probate Actions* (see the definition *Ord. LXXI. r. 1*).

THE Orders and Rules of the Supreme Court, 1883, apply to "probate actions" (*Ord. LXXI. r. 1*): but the old rules and orders of the Court of Probate are in force subject thereto.

By section 18 of the Jud. Act, 1875, all rules and orders of court in force at the time of the commencement of the act in the Court of Probate (and the Court for Divorce and Matrimonial Causes, and the Admiralty Court) except so far as they are expressly varied by the first schedule thereto, or by Rules of Court made by Order in Council before the commencement of the act, remain and are in force in the High Court of Justice until altered or annulled by any Rules of Court made after the commencement of the act.

The only powers of enforcing discovery possessed by the old Ecclesiastical Courts in probate cases seem to have been the power of ordering an affidavit as to scripts (see *post*, p. 563), and of ordering production in the registry of particular documents proved to be material, and, it seems, whether pleaded or not: *Peacocke v. Loe*, 36 L. J. P. & M. 91: L. R. 1 P. & D. 478, n. For other discovery the party was obliged to go into equity and file a bill of discovery: *ibid.*: *Fuller v. Ingram*, 5 Jur. N. S. 510: see *post*, p. 613. See *post*, p. 613, generally as to bills of discovery in aid of the Ecclesiastical Courts.

The Probate Court was not within the C. L. P. Acts. But by section 36 of the Court of Probate Act, 1857, it was provided that when the court should order a question of fact to be tried before itself by a jury the Court of Probate should for all purposes of or auxiliary to the trial of questions of fact by a jury before the court itself and in respect of new trials thereof, and also for all purposes in relation to or consequential upon the direction of issues have the same jurisdiction, powers and authority in all respects as belonged to any

superior court of common law or to any judge thereof, or to the High Court of Chancery or any judge thereof, for the like purposes. And this section was interpreted as conferring upon the court in such cases all the powers of ordering discovery possessed by the courts of common law and of equity: *Hunt v. Anderson*, L. R. 1 P. & D. 476, commenting on *Peacocke v. Loe*, ante, where this section was not referred to. Accordingly in this case (issues having been ordered to try the pleas raised by the defendant, insanity and undue influence) the plaintiffs were ordered to make an affidavit of documents, and in particular as to letters written by and to the testator or on his behalf, to produce such of them as were in their own possession, and (in effect) to account for any that had been destroyed, for they might have the strongest possible bearing on the question of the testator's sanity. So the defendant was ordered to make a similar affidavit as to correspondence between himself and the testator.

As to testamentary papers or writings.

The Court of Probate may, on motion or petition or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same; and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the court: Court of Probate Act, 1857, section 26. Applications for an order for the production of papers or writings purporting to be testamentary may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpoena for the production of the same may be obtained by a registrar's order, founded on an affidavit. Rule 73 of the same act.

The examination of a person under this section respecting his knowledge of testamentary papers must be either in open court or on interrogatories: *Laws*, 2 P. & D. 458.

Counsel may attend on his behalf and put questions to him and also to the other persons required to attend: *Cope*, 36 L. J. P. & M. 83.

### The affidavit as to scripts.

Rules 30—32 of the Court of Probate (1862) provide as follows:—

In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession. Every script which has at any time been made by or under the direction of the testator, whether a will codicil draft of a will or codicil or written instructions for the same, of which the deponent has any knowledge is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry. No party in the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

The body of the form of affidavit as to scripts is as follows:—I, A. B. of        in this county of       , party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be, or having the form or effect of a will or codicil or other testamentary disposition of E. F. late of        in the county of        deceased, the deceased in this cause, or being or purporting to be instructions for, or the draft of, any will, codicil, or testamentary disposition of the said E. F. has at any time, either before or since his death, come to the hands, possession or knowledge of my solicitors in this suit, so far as is known to me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this court [or “hereunto annexed” or *as the case may be*] the said will bearing date the        day of        18        [or *as the case may be*] also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

In probate actions the plaintiff shall, unless otherwise ordered by the court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default: but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts. Ord. XX. r. 2.

The practice of ordering an affidavit as to scripts was an old one: see *ante*, p. 561.

A further affidavit would be ordered if necessary: *Peacocke v. Lowe*, *ante*, p. 561.

Instructions for a will should be included in the affidavit: *Foxwell v. Poole*, 3 Sw. & Tr. 5.

See as to the conditions necessary to entitle a party to an affidavit *Antrobus v. Leggatt*, 3 Hagg. 616.

## II. Divorce and Matrimonial Causes.

Nothing in the rules of the Jud. Act, save as expressly provided, shall affect the procedure or practice in proceedings for divorce or other matrimonial causes: see Ord. LXVIII. r. 1.

See section 18 of the Jud. Act, 1875, *ante*, p. 561, con-

tinuing the orders and rules of this court in force at the commencement of the act.

In a suit for nullity of marriage Butt, J. gave leave to interrogate the petitioner as to the identity of the person alleged to be the respondent's husband and alive, observing that it was in accordance with the practice of the Divorce Division to order interrogatories, and that he should continue the practice: *Euston v. Smith*, 9 P. D. 57.

There was no direct statutory enactment conferring any powers of discovery on the Court for Divorce and Matrimonial Causes: section 47 of the Act of 1857 conferred upon it the powers of the common law courts as to interrogatories on commission.

It seems however to have been considered that this court possessed the common law equitable jurisdiction of ordering inspection of documents: see *Shaw v. Shaw*, 2 S. & T. 642, where the petitioner was allowed to inspect and take copies in order to be able to give particulars of acts of cruelty: and in effect the powers conferred by the C. L. P. Acts: see *Pollard v. Pollard*, 3 S. & T. 613. In this last case the petitioner was ordered to bring into the registry for the inspection of the judge, in order that he might determine whether the respondent was entitled to see them (in which case an order for inspection and taking copies would be made), certain letters from the respondent to the petitioner alleged to contain matters which might operate to reduce the damages, unless he should file an affidavit stating that he had no such letters or that they did not contain those matters: and so in a similar case, *Winscom v. Winscom*, 3 S. & T. 383: and also in the last case letters by the petitioner to the respondent.

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### III. Admiralty Causes.

The orders and rules of the Supreme Court apply to admiralty causes. By section 18 of the Supreme Court of Jud. Act, 1875 (see *ante*, p. 561) all rules and orders of the Admiralty Court in force at the time of the commencement



of the act were continued except as expressly varied : but by Rules of S. C. 1883, the rules orders and regulations for the High Court of Admiralty of England, 1859 and 1871, are annulled, and the orders and rules of S. C. 1883, stand in lieu thereof.

Prior to the Admiralty Court Act, 1861, this court seems to have had no power of compelling discovery. Section 17 of that act conferred on the judge of the High Court of Admiralty all such powers as were possessed by any of the superior courts of common law or any judge thereof to compel either party in any cause or matter to answer interrogatories and to enforce the production inspection and delivery of copies of any document in his possession or power.

Under the powers thus conferred Phillimore, J. decided, so far as he was able, to mould the practice rather in conformity with that of the Courts of Chancery than that of the common law courts: *The Mary* or *Alexandra*, L. R. 2 A. & E. 319.

Before application to the court for an order for inspection the applicant should have applied to the party himself for inspection, otherwise he would be ordered to pay the costs of the application: *The Memphis*, L. R. 3 A. & E. 23 (and see *ante*, p. 269).

The common law practice of insisting as a condition of ordering an affidavit of documents that the applicant should show some one material document to be in the adversary's possession was followed in admiralty: *The Cordelia*, 28 L. T. 776.

Where the plaintiffs alleged that in performance of salvage services they had been obliged to deviate from their course and relied on the possible risk in respect to the vacation of their policies of insurance as an ingredient to be considered in fixing the amount of salvage, inspection by the defendant of the policies and bills of lading was ordered: *The Memphis*, L. R. 3 A. & E. 23.

### The Preliminary Act.

In actions in any Division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until ordered by the court or a judge, and which shall contain a statement of the following particulars: (a) the names of the vessels which came into collision and the names of their masters: (b) the time of the collision: (c) the place of the collision: (d) the direction and force of the wind: (e) the state of the weather: (f) the state and force of the tide: (g) the course and speed of the vessel when the other was first seen: (h) the lights, if any, carried by her: (i) the distance and bearing of

the other vessel when first seen : (k) the lights, if any, of the other vessel which were first seen : (l) whether any lights of the other vessel, other than those first seen, came into view before the collision : (m) what measures were taken, and when, to avoid the collision ; (n) the parts of each vessel which first came into contact. Ord. XIX. r. 28 (first part).

The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection : *The Frankland*, 3 A. & E. 511.

It cannot be amended at the hearing : *ibid.*

The rule only applies to actions by one ship against another : not for instance to an action by the owner of cargo which may have been damaged by the collision : *The John Boyne*, 25 W. R. 756.

Interrogatories seeking information which would to a great extent be afforded by the preliminary act could not be struck out under the old rules (see *ante*, p. 100) as being exhibited unreasonably or vexatiously, or otherwise : *The Radnorshire*, 5 P. D. 172 ; though in an earlier case, *The Biola*, 34 L. T. 185, interrogatories of this character were struck out under the original rule (see *ante*, p. 100).

See *ante*, p. 460, as to the interrogatory which was struck out in *The Radnorshire* as being too vague ; though *qu.* whether under that rule it was properly struck out, see *ante*, p. 105.

See *The Murillo*, cited *ante*, p. 97, where discovery of the names of the owners of the ship was ordered from a defendant sued in personam before petition filed.

The practice as to particulars is now the same in admiralty causes as in actions in the Queen's Bench Division : *The Rory*, 7 P. D. 117, disapproving *The Freedom*, L. R. 2 A. & E. 346, so far as in that case the observations of Phillimore, J. tended towards restricting the granting of particulars in admiralty causes. See as to instances of particulars ordered in admiralty causes, *ante*, p. 455.

By section 18 of the Admiralty Court Act, 1861, any party in a cause in the High Court of Admiralty was at liberty to apply to the court for an order for inspection by the Trinity Masters or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship or other personal or real property the inspection of which might be material to the issue of the cause ; and the court might make such order in respect of the costs arising thereout as to it shall seem fit.

## CHAPTER IV.

DISCOVERY AFTER AND FOR THE PURPOSE OF WORKING OUT A  
DECREE OR ORDER IN CHAMBERS—DISCOVERY IN AID OF  
EXECUTION.I. *Discovery after and for the purpose of working out a Decree  
or Order in Chambers.*

It has been seen generally *ante*, pp. 21 and 24—27, that a party seeking relief is entitled to discovery for the purpose of getting a perfect decree or enabling him to work out a decree, but that where discovery of this nature is not required for the determination of any matter to be tried at the hearing, and the giving of it might be prejudicial to the party from whom it is required, it will be postponed until after decree.

No limit of time is imposed by Rule 1 dealing with interrogatories, by Rule 12 dealing with affidavits of documents, or by Rule 15—18 dealing with inspection; and Rule 14 enables production to be ordered at any time during the pendency of the cause or matter.

By Ord. LV. r. 16 (similar to section 30 of the Ch. P. Act, see *post*) each chief clerk shall, for the purpose of any proceedings directed to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, to take affidavits and acknowledgments, other than acknowledgments by married women, and when so directed by the judge to examine parties and witnesses either upon interrogatories or *vivâ voce*, as the judge shall direct. And Rule 17 enables him to enforce orders so made.

The Central Office is the primary place for production for the purpose of proceedings in chambers, as it is before decree

in the Chancery division: see *ante*, p. 165: and Ord. LXI. r. 30, *ante*, p. 166, following Consol. Ord. XLII. r. 3.

The old form of decree in Chancery directing a reference to the master for inquiries or accounts ordered that, for the better taking such inquiries or accounts and discovery of the matters aforesaid, the parties should produce before the master all deeds (or books) papers and writings in their custody or power relating thereto, and be examined upon interrogatories as the master should direct. And by Ord. LX. of 1828, the master was to have a discretion as to what documents should be, and when and how long, left or deposited in his office, or, if not necessary to be so left or deposited, was to give directions for inspection as he might think fit. By 15 & 16 Vict. c. 80, the master's office was abolished: and sections 30 and 31 of that act were to the same effect as Ord. LV. rr. 16 and 17, *ante*. It was held (*Hart v. Montefiore*, 30 Beav. 280; *Richards v. Watkins*, 6 Jur. N. S. 168) that under the Ch. P. Act orders for discovery and production of documents could be made for the purpose of proceedings in chambers after decree on and at the instance of the same persons as under the previous practice: and by Consol. Ord. XLII. r. 4, it was expressly provided that the course of procedure in use as to the production of documents ordered to be produced before the hearing of a cause should extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter.

See for instance *Turney v. Bayley*, cited *ante*, p. 309, where an order for production of documents was made on the hearing after decree for accounts, the motion having been previously ordered to stand over to the hearing. See also *Pickering v. Do.* *ante*, p. 236. See also *Ripplin v. Dolman*, 2 W. R. 432, where an order for production was refused, the proceedings in chambers being at an end.

The practice as to interrogatories will probably be in accordance with the old Chancery practice; that is to say, they are drawn by the applicant and settled at an appointment for that purpose: see further as to the practice Dan. Ch. Pr. 1061: and the forms in Dan. Ch. F. (edition, 1877) 932—940: see also *ante*, p. 148, as to settling interrogatories after a third insufficient answer: and *post*, p. 585 as to committal.

The persons from whom and in favour of whom discovery has been enforced after decree:—

See *ante*, p. 61, as to the definitions of plaintiff, defendant, and party, under the Jud. Act, sect. 100.

A defendant could (though not before decree, see *ante*, p. 58) obtain discovery and production of documents from a co-defendant: *Hart v. Montefiore*, 30 Beav. 280. After decree for sale in a partition suit ordering an inquiry as to real estate, one defendant, tenant in common, was ordered to give discovery of documents in favour of his co-defendant tenant in common: *Kennedy v. Wakefield*, 39 L. J. Ch. 827.

A claimant coming in under a decree has been ordered to give discovery and production of documents relating to his claim: *Pine v. Ellis* cited in Dan. Ch. Pr. p. 1065: and see *Groves v. Groves*, 2 W. R. 86 (further cited

*ante*, p. 179, in connection with the subject of inspection by experts or witnesses), where the plaintiff in an administration suit was held entitled to inspect at the office of the claimant's solicitor documents admitted by the claimant in his answers to interrogatories.

Conversely a creditor showing a *prima facie* claim has been held entitled to discovery and production of documents relating to his claim from the executor or administrator: *MacVeagh v. Croall*, 1 D. G. J. & S. 399: and see the form in Seton, p. 139; *Bowen v. Pearson*, 9 Jur. N. S. p. 791: so a person claiming as next of kin and showing a reasonable case, of documents which might help him to establish his title: *Newland v. Steer*, 13 W. R. 1014. So one claimant as against another claimant: *ibid.*

Where an order had been made in an administration suit on the application of the trustees (defendants) that a certain contract should be carried into effect, the purchaser consenting to be bound as if he were a party, and the latter had taken out a summons for compensation in respect of the purchase he was held entitled to the common order against the trustees: *Dent v. Dent*, L. R. 1 Eq. 186.

### Other instances of discovery after decree or judgment:—

Where a decree for specific performance of an agreement for the sale of leasehold property ordered that the defendant should deliver to the plaintiff (the purchaser) on oath if required all deeds and writings in his possession or power relating to the property, subsequently a four days' order by consent was made that the defendant should produce to the plaintiff at the office of the defendant's solicitors the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power relating to the property: *Joy v. Hadley*, 22 Ch. D. 571.

Where in a suit by a debenture holder to realise his security, which covered the general undertaking of the company, an order had been made for a receiver of the tolls, an order was made for discovery of the superfluous lands of the company but limited to those belonging to the general undertaking of the company, the question whether or not the powers of the receiver extended to the superfluous lands being then under appeal, *Gardner v. L. C. & D. Rail. Co.* 15 W. R. 137.

See *ante*, p. 554, where discovery after decree was ordered in actions for infringements of patents.

After decree for account in a common law action for infringement of a patent an order was made for production of the defendant's books and for interrogatories for the purpose of the account, the defendants having refused to produce their books before the master: *Saxby v. Easterbrook*, L. R. 7 Ex. 207.

In an action for breach of promise where judgment had been allowed to go by default, and the question of damages referred to the master, it was held that the court had power to order inspection of documents (letters to the defendant from the plaintiff of which she had no copies, see *ante*, p. 267) for the purpose of the reference, but the Divisional Court refused to interfere with the discretion exercised by the judge who refused the application on the ground of costs: *Ladds v. Walthew*, 32 W. R. 1000. It was argued that the application should be granted in order to prevent the plaintiff being surprised on cross-examination.

After decree the order should specify particularly the matters as to which discovery of documents is required: *Haldane v. Eckford*, L. R. 7 Eq. 425 (where the plaintiff, executor, was ordered to make an affidavit of documents relating to the inquiries as to domicile and next of kin). But where the per-

son against whom the order is sought cannot show how the order can be limited it may have to be made in general terms, and any objections must be taken in the affidavit: *Kennedy v. Wakefield*, 18 W. R. 884.

In *Bowen v. Pearson*, 9 Jur. N. S. 789, under special circumstances a defendant, late partner and the executor of the solicitor agent trustee and executor of the testator, was ordered on the application of the new trustees to make an affidavit of all documents in his possession relating to the trust estate and to state therein in what character or capacity he claimed to hold them, for he could not have refused to give such information if a bill had been filed against him.

Where a defendant had already before decree (for partnership accounts) made full discovery of documents in answer to interrogatories he was ordered to make an affidavit of all documents other than those mentioned in such answer, and particularly any diaries or memorandums: *Hanslip v. Kitton*, 1 D. G. J. & S. 440.

Production can of course only be ordered on the party's own admission of possession: *Kemp v. Wade*, 2 Keen, 686.

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## II. *Discovery in aid of Execution.*

The following rules of the Supreme Court are headed "Discovery in aid of Execution:"—

When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the court as the court or judge shall appoint: and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents: Ord. XLII. r. 32.

In case of any judgment or order other than for the recovery or payment of money if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the court or a judge, and the court or judge may make such order thereon for the attendance and examination of any party or otherwise as may be just: Ord. XLII. r. 33.

The costs of any application under the last two preceding rules or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the court or a judge, or in the discretion of such officer as

in Rule 32 mentioned, if the court or a judge shall so direct: Ord. XLII. r. 34.

Section 60 of the C. L. P. Act, 1854, from which Rule 32 is taken directed that the examination was to be conducted in the same manner as the oral examination of an opposite party before a master under section 53 for default in answering interrogatories (as to which see *ante*, p. 146).

Any questions may be put which are directed towards ascertaining from a reluctant debtor what debts he has owing to him: Jessel, M. R. in *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8, p. 12. It is intended to be a cross-examination of the severest kind: James, L. J. *ibid.* p. 13.

Before the passing of the C. L. P. Act, 1854, it was necessary to file a bill of discovery for this purpose. A bill of discovery would lie either in aid of a writ of elegit or a writ of fi. fa.: *Mountford v. Taylor*, 6 Ves. 788; *Smith v. Hurst*, 10 Ha. p. 48, n.: Redes. Pl. 126: *The Protector and Lord Lumley*, cited *ante*, p. 333. The writ must have been sued out: Redes. Pl. 126: *Angell v. Draper*, 1 Vern. 398: but see *Taylor v. Hill*, *ibid. post*, where the writ had not been sued out. Discovery might be had whether (and when and to whom and for what consideration) the debtor had not conveyed away particular lands without consideration, but not as to his dealings with all his property during a long period: *Mountford v. Taylor*: so whether he had not conveyed away his estate to trustees for himself: *Smithier v. Lewis*, 1 Vern. 398.

And a bill of discovery would lie against a person charged to have property of the debtor in his hands to discover the particulars: *Angell v. Draper*: and where the charge related to specified property only, it was held unnecessary first to sue out a writ of elegit or fi. fa.: *Taylor v. Hill*: but qu. See also *Anon.* 1 Eq. Ca. Ab. 75, where it was said that if the king granted the goods of a felon the grantee might compel anyone in whose possession they were to discover them.

A bill would also lie against a banker for discovery of a defendant's monies after sequestration: *Simmons v. Kinnaird*, 4 Ves. 735.



## CHAPTER V.

## DISCOVERY IN CAUSES OR MATTERS OTHER THAN ACTIONS.

INTERROGATORIES may it seems be delivered in any cause or matter under the present Rule 1 of Ord. XXXI. though not under the old rule: see *ante*, p. 91.

Discovery and production of documents may be ordered in any cause or matters under Rules 12, 14: (under the old Rule 12 "any action:" under the old rule 11 corresponding to the present Rule 14 "in any action or proceeding"): see *ante*, pp. 152, 155. And notice of inspection under Rule 15 may be given in any cause or matter ("action or other proceeding" under the old rule): see *ante*, p. 240.

By section 100 of the Jud. Act (and Ord. LXXI.) cause includes any action, suit or other original proceeding between a plaintiff and defendant: matter includes every proceeding in the court not in a cause: pleading includes any petition or summons: and see *ante* p. 61, as to the definitions of plaintiff, defendant and party. See generally *ante*, Book I. Chap. III. as to the persons in favour of whom and from whom discovery can be enforced.

In section 50 of the C. L. P. Act, 1854, the words were "cause or civil proceeding," in section 51 "cause." In section 6 of the C. L. P. Act, 1852, the words were "action or other legal proceeding." See these sections set out, *post*, Appx. Chap. II.

By Ord. LV. r. 16, the chief clerk has power to order discovery for the purpose of proceedings before him: see *ante*, p. 567.

See as to discovery for the purpose of working out a decree or order in chambers *ante*, Chap. IV.

See as to inspection in a winding-up petition, *Re Credit Co.* 11 Ch. D. 256, and *Re Great Devon West Consols Mine*, cited *ante*, p. 292.

See generally as to discovery in proceedings under the Companies Act, 1862, *ante*, p. 293.

See as to an issue under a writ of fi. fa. *Andrew v. Pell*, *ante*, p. 267.

See *post*, pp. 613—614, as to the proceedings in aid of which bills of discovery would lie.

Discovery cannot be had on an election petition: *Salisbury Election Petition*, 31 W. R. 610 (inspection of agents' books, vouchers and other documents relating to the election): *Wells v. Wren*, 5 C. P. D. 546 (interrogatories).

An interpleader issue was a cause within section 51 of the C. L. P. Act, 1854 (interrogatories): *White v. Watts*, 12 C. B. N. S. 267. So now it is within Ord. XXXI.: see *Phillips v. Phillips*, 40 L. T. p. 821, where Lindley, J. seems to have so considered it.

The court has jurisdiction under Jud. Act, 1873, section 100, Ord. XXXI. r. 1, and Ord. LXXI. r. 1, to give leave to a petitioner in a petition for revocation of a patent under 46 & 47 Vict. c. 57, s. 26, to exhibit interrogatories on making the usual deposit: *Re Haddan's Patent*, W. N. 84, p. 192: 51 L. T. 190.

A person, not a party to the suit, who had obtained an order for an inquiry pro interesse suo in respect of property seized under a sequestration could, it was held, be ordered to make an affidavit of documents for the purpose of the inquiry at the plaintiff's instance: *Alton v. Harrison*, W. N. 69, p. 81.

### I. *Arbitrations or References.*

See as to references to official referees *post*, p. 606.

Where an order by consent had been made referring the action and all matters in difference between them to the award of an arbitrator it was held that no order could be made by the judge for an affidavit of documents, for the action had disappeared except as to the ministerial duty of entering judgment and therefore there was no matter in question in the action within Rule 12. It was also said that the parties had agreed to place the whole jurisdiction with

reference to discovery in the arbitrator's hands, and application might have been made to him : (the order directed that the arbitrator might examine the parties on oath and that the parties should produce all documents in their custody or power relating to the matters in difference) : *Penrice v. Williams*, 23 Ch. D. 353 : but see *post*.

Where a submission to arbitration had been made a rule of court it was held that one of the parties to the submission could not be ordered by a judge without suit to give discovery of documents at the instance of the other party under section 50 of the C. L. P. Act, 1854, or apparently otherwise : *Re Anglo-Austrian Bank*, 40 L. T. 369.

The courts of equity would not entertain a bill of discovery in aid of a voluntary arbitration : the parties by submitting to arbitration must be taken to have meant that they would be content with a decision on such discovery as an arbitrator could compel : they would not be permitted to take their relief there, and come to equity for discovery : a court of equity would not be ancillary to the forum to which the parties had chosen to resort : *Street v. Rigby*, 6 Ves. 815, pp. 819, 821 : and see *Wellington v. McIntosh*, 2 Atk. 569 : and *post*, p. 614, as to bills of discovery.

But a bill of discovery would lie in aid of a compulsory reference under the C. L. P. Act : *British Empire Shipping Co. v. Somes*, 3 K. & J. 433, p. 436 : see also *Ainsworth v. Starkie*, W. N. 76, p. 8.

Provision is generally inserted in orders of reference for production by the parties before the arbitrator of all documents relating to the matters in dispute as the arbitrator shall require : and similar provisions are made by various statutes such as the Lands Clauses, Railways Clauses, and other Acts.

But this gives him no power to order discovery of documents : see *Re Anglo-Austrian Bank* : *British Empire Shipping Co. v. Somes* : and a bill of discovery may therefore be necessary. But see *Penrice v. Williams*, *ante*, where Chitty, J. suggested an application to the arbitrator for discovery of documents.

II. *Discovery under the Bankruptcy Act and Rules, 1883.*

Section 27. (By Rule 70 an application under this section is to be in writing, and must state shortly the grounds: and where not made on behalf of the trustee, official receiver, or board of trade, must be verified by affidavit) :—

(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination.

(3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

Rule 61. The court may in any matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court may think fit to be produced.

Rule 64. Any party to any proceeding in court may with the leave of the court administer interrogatories to or obtain discovery of documents from any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made *ex parte*.

The object of section 27 is discovery, not testimony: *Ex parte Willey*, 23 Ch. D. 118, pp. 128, 131: *Ex parte Nicholson*, *Re Willson*, 14 Ch. D. 243.

See as to what is possession *Re Leighton and Benett*, L. R. 1 Ch. 331.

A mortgagee may be ordered to produce his mortgage deed, transfer deed, &c. under this section: *Ex parte Tatton*, 17 Ch. D. 512: *Re Marks*, L. R. 1 Ch. 429: *Ex parte Caldecott*, Mont. 55: and see *ante*, pp. 542—546, as to the ordinary privileges of a mortgagee. Nor can a solicitor refuse production on the ground of his lien: see *ante*, p. 206.

The person summoned cannot be ordered to furnish an account in writing, not on oath: he can only be examined on oath, orally or by written interrogatories: *Ex parte Reynolds*, *Re Reynolds*, 21 Ch. D. 601.

The trustee can be examined on a creditor's application : *Ex parte Crossley, Re Taylor*, L. R. 13 Eq. 409.

The section did not apply to composition proceedings : *Ex parte Willey*.

A bill of discovery would lie against strangers to discover concealments of a bankrupt's estate : *Boden v. Dellon*, 1 Atk. 288.

See as to discovery of acts vitiating a bankrupt's certificate, *ante*, p. 320 : discovery of act of bankruptcy, *ante*, p. 312 : and as to concealing a bankrupt's goods, *ante*, p. 312.

Where the debtor is summoned under section 27 he cannot refuse to answer a question concerning his dealings or property although the answer may tend to show that he has concealed his effects or been guilty of any other offence connected with his bankruptcy (it is not clear from these cases whether where the offence is not an offence under the bankruptcy laws he is protected) ; and his answers can be used against him afterwards for the prosecution : *R. v. Scott*, 25 L. J. Mag. p. 131 : *R. v. Skeen*, 28 L. J. Mag. pp. 98—99 : *R. v. Robinson*, L. R. 1 C. C. R. 80, pp. 85, 90 : *R. v. Widdop*, L. R. 2 C. C. R. 3. It is his duty to produce all his estate and effects for the benefit of his creditors, and he could not be allowed to conceal a part on the ground that if he disclosed where it was he might be prosecuted for crime : there is a personal obligation upon him : see James, L. J. in *Re Firth, Ex parte Schofield*, 46 L. J. Bk. 112.

But any other person summoned under this section is entitled like every other witness to refuse to answer any criminatory questions : see James, L. J. *ibid* : and *Ex parte Reynolds*, 21 Ch. D. 601.

## CHAPTER VI.

INSPECTION OF PROPERTY OTHER THAN DOCUMENTS IN ANY  
CAUSE OR MATTER.I. *In any Cause or Matter.*

It shall be lawful for the court or a judge upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Ord. L. r. 3.

Under this rule the court has larger powers than the courts of equity possessed: see *Lumb v. Beaumont*, *post*.

No order will be made against a party (plaintiff) for inspection of the subject-matter of the action where he has neither the possession thereof nor the property therein: *Reid v. Powers*, 28 S. J. 653 (parcels of wheat, the bills of lading of which were held by bankers, not parties to the action, who would therefore not be bound by the order, and without whose courtesy therefore the plaintiff could not comply with it).

An order in Chancery for inspection could not be executed by force: it was an order on the party to permit inspection, and if he refused to permit it, he committed a contempt, and the bill might be taken pro confesso, as in the case of an insufficient answer: *Kynaston v. E. I. Co.* 3 Bligh, 153, p. 163; affirming 3 Sw. 248, see *post*, p. 580.

The costs of inspection are in the judge's discretion: *Mitchell v. Darley Maine Colliery Co.* 10 Q. B. D. 457, where the order directing inspection of the defendant's property provided that the plaintiff should pay the costs of such inspection in any event. But qu. whether unless an order is

made the costs cannot be recovered by either party as there said: see *ante*, pp. 175—176.

By the C. L. P. Act, 1854, section 58, either party to an action was enabled to apply for a rule or order for inspection by the jury\* or by himself or by his witnesses of any real or personal property, the inspection of which might be material to the proper determination of the question in dispute, such rule or order to be made on such terms as to costs or otherwise as the court or judge might direct: see *Bennett v. Griffiths*, 3 E. & E. 467.

The practice of granting orders for inspection of mines machines, &c. where necessary for the purposes of justice was well settled in equity: see note to *Lonsdale v. Curwen*, 3 Bligh, p. 171: *Barlow v. Bailey*, 18 W. R. p. 784: *Whaley v. Brancker*, 12 W. R. 595.

In respect of alleged trespasses in the working of mines an order for inspection was, according to Lindley, J. so common a one in Chancery as to be a matter of course: *Cooper v. Ince Hall Co.* W. N. 76, p. 24, where an order was made in spite of an affidavit by the defendant that for reasons apart from the action it was important that the working of the mines should not be seen: and see *Whaley v. Brancker*, 12 W. R. 570, 595: *A. G. v. Chambers*, 12 Beav. 159.

In making orders for inspection the court would if necessary order the removal of obstructions or give any directions for the purpose of securing a proper inspection: *Lonsdale v. Curwen*, 3 Bligh, 168: *Walter v. Fletcher*, *ibid.* 173: *Bennett v. Griffiths*, 3 E. & E. 467 (inspection of mines).

In a recent case, *Lumb v. Beaumont*, 28 S. J. 708: 51 L. T. 197: where the defendants denied that the drain of their house was connected with the plaintiff's drain, an order†

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\* Inspection by the judge or jury is now provided for by Ord. L. rr. 4, 5.

† The order was as follows: "Without prejudice to the rights of any other person or authority the plaintiff is to be at liberty on giving forty-eight hours' notice to the defendants to enter upon that part of the street the soil of which belongs to the defendants, for the purpose of experimenting in order to discover whether the pipe which joins the plaintiff's drain proceeds from the defendants' house and for that purpose to excavate the street so far as may be necessary, the plaintiff undertaking to do no unnecessary harm and to replace the street as soon as his investigation is concluded as quickly as possible and at his own expense."



was made giving the plaintiff liberty to break up the soil on the defendants' premises, Pearson, J. considering that *Ennor v. Barwell*, *post*, had nothing to do with the construction of Ord. L. r. 3, *ante*, which gave a convenient power of inspection before the trial of the action, in order that the court might have the proper materials before it at the trial.

In *Ennor v. Barwell*, 1 D. G. F. & J. 531, a suit brought in respect of an alleged diversion of a stream by the defendant, the Court of Appeal refused to add to an order for inspection of the defendant's land directions for the removal of obstructions or for the cutting of trenches and other purposes, on the ground that it was not according to the course of the court to make upon an interlocutory application before the hearing an order authorizing the plaintiff to break up the soil of the defendant's property for the purpose of inspection. So directions of this nature were refused in *Cooper v. Ince Hall Co.*

In *Bennett v. Whitehouse*, 28 Beav. p. 122 (suit for trespass in working mines), Lord Romilly laid it down that wherever it appeared that a person had power to make use of his land to the injury of another and there was *prima facie* evidence of his doing so, though it was contradicted, still as the only way of ascertaining the fact was by an inspection the court always allowed it if it could be done without injury to the defendant.

Generally it seems inspection of premises would be granted where it was necessary for the purpose of justice: see *Barlow v. Bailey*, 18 W. R. p. 784. But where in an action for nuisance of smell inspection of the place where it was created was unnecessary, for the nuisance was provable from external sources, an order was refused: *ibid.*

So inspection with liberty to take plans, &c. may be ordered in light and air cases: see Dan. Ch. F. 1756.

This jurisdiction was also exercised by courts of equity in other cases:—Where a man has a right to receive a certain sum in the pound on the value of trees the court has ordered inspection of the trees: so in the case of a commission on diamonds inspection would be ordered of the diamonds: so in an action for partition of a house an entry was permitted to determine how it was to be divided: Lord Eldon, in *Kynaston v. East India Co.* 3 Sw. p. 264. In *Macclesfield v. Davis*, 3 V. & B. 16, Lord Eldon ordered inspection of heirlooms to recover which the suit was brought. And so inspection of

pawned articles was ordered in *Marsden v. Payshall*, 1 Vern. 408, in order to enable the plaintiff to bring an action of trover for them. And where an action was brought against the owners of houses to recover tithes, the plaintiff's witnesses were allowed to inspect the houses preparatory to their examination for the purpose of proving their value: *Kynaston v. East India Co.* 3 Sw. 248, aff. on app. 3 Bligh, 153.

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## II. *Inspection of Premises Machinery Processes, &c. and taking of Samples in Actions for infringement of Patents or Trade Marks.*

Rule 3 of Ord. L. cited *ante*, and discussed in the last section, applies to any cause or matter. See as to inspection under the Merchandise Marks Act *post*, p. 582.

By 46 & 47 Vict. c. 57, s. 30, it is provided as follows:—  
 “In an action for infringement of a patent the court or a judge may on the application of either party make such order for an injunction inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the court or a judge may see fit.”  
 This act repeals 15 & 16 Vict. c. 83, sect. 42 of which conferred similar powers upon the common law courts. Under that section it was held that an application to inspect a defendant's machinery might be made before declaration; but an order would not be made as a matter of course: the applicant must show that it was material for the purpose of the action: *Amies v. Kelcey*, 22 L. J. Q. B. 84: or was really required to prove his case: *Meadows v. Kirkman*, 29 L. J. Ex. 205: and generally see *Holland v. Fox*, 23 L. J. Q. B. 211: *Vidi v. Smith*, *ibid.* 342: *Shaw v. Bank of England*, 22 L. J. Ex. 26, 210: *Jones v. Lee*, 25 L. J. Ex. 241: and generally there was not the same disposition to grant inspection as in equity: see *post*.

In courts of equity inspection, with liberty to take samples, was ordered under their ordinary jurisdiction. Though (see

*ante* and *Patent Type Co. v. Walter, post*) greater readiness was shown in making such orders than at common law, yet it has been said that an order would only be made where it was essential to enable the party to prove his case: *Batley v. Kynock*, L. R. 19 Eq. 91: *Pigott v. Anglo-American Telegraph Co.* 19 L. T. 46: at least he must show a *prima facie* case: *Davenport v. Jepson*, 1 N. R. 307: *Singer Manufacturing Co. v. Wilson*, 13 W. R. 560: there must be a difficulty of obtaining proof: *Neilson v. Betts*, L. R. 5 H. L. p. 11.

Inspection and delivery of samples for the purpose of analysis was ordered in *Patent Type Co. v. Walter*, Johns. 727, after such an order had been refused at common law: *ibid.* 5 H. & N. 192: and so in *Hennessey v. Bohmann, post*.

In an early case *Crofts v. Peash*, 1 Webst. Pat. Ca. 268, the court refused to order a plaintiff to produce a specimen (lace) on the ground that it would be disclosing his evidence.

In *Smith v. G. W. Rail. Co.* 6 E. & B. 465, the defendant having said in his answer to an interrogatory that he could not explain the construction of a wheel except to a person who had the wheel before him, an order was made for the plaintiff and two engineers to inspect the wheel, the defendant to attend and give information, or in default to be orally examined: see also *ante*, p. 555, referring to an interrogatory in *Crossley v. Tomey*.

In *Hennessey v. Bohmann*, 36 L. T. 51, an action to restrain the defendant from selling bottles of brandy branded or labelled like the plaintiff's, an *ex parte* (on the ground that it was a case of emergency and that if notice were given the defendant would remove the goods from the premises) order was made for some proper person to enter on the premises for the purpose of inspecting the cases and bottles and taking samples.

Sometimes the party himself has been allowed to inspect: *Henderson v. Runcorn*, Seton, p. 351. Sometimes other persons (scientific witnesses: *Davenport v. Jepson*, 1 N. R. 307: *Shaw v. Bank of England*, 22 L. J. Ex. 210) have been named in the order, on the understanding that they were not to communicate to the party any special or secret process in

use by the defendant but solely to report to his solicitor whether or not in their opinion the process was an infringement of his patent and whether it was the ordinary process: *Flower v. Lloyd*, Seton, p. 351. See also *Hennessey v. Bohmann*, *ante*, where no person seems to have been named. See also *Russell v. Cowley*, 1 Webst. Pat. Ca. 457, where it was arranged between the parties that some person should inspect and give evidence. See generally as to inspection of documents by special persons *ante*, p. 177.

In *Singer, &c. Co. v. Wilson*, 13 W. R. 560, the defendant was ordered to verify by affidavit all the different classes of his machines and produce one of each class for inspection.

The order would it seems if necessary direct that the machine may be put to work on the process: see Dan. Ch. F. 1761: *Russell v. Cowley*, 1 Webst. Pat. Ca. 457.

So the order may direct the machines to be produced on the examination of witnesses and at the trial: see Dan. Ch. F. 1761.

Inspection under the Merchandise Marks Act 25 & 26 Vict. c. 88.

By section 21 in any suit at law or in equity against any person for forging or counterfeiting any trade mark or for fraudulently applying any trade mark to any chattel or article or for selling exposing for sale or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto or with any forged or counterfeit trade mark applied thereto or for an injunction in respect thereof, the court or a judge has power to make an order for inspection of "every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade mark or any such trade mark as aforesaid shall be alleged to be used or applied as aforesaid and of every or any chattel article and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark or any trade mark falsely or wrongfully applied and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used for producing or making any forged or counterfeit trade mark or trade mark alleged to be forged or counterfeit or for falsely or wrongfully applying any trade mark: and any person who shall refuse or neglect to obey any such order shall be guilty of contempt of court."

See other sections *ante*, p. 556.

## CHAPTER VII.

MEANS OF ENFORCING AND PENALTIES FOR REFUSING FULL  
DISCOVERY.

SEE as to ordering a further answer to interrogatories under Ord. XXXI. r. 11 either by affidavit or by vivâ voce examination, *ante*, p. 145.

See as to ordering a further affidavit of documents, *ante*, p. 210.

See as to the penalty of not being allowed to use a document in evidence, *ante*, p. 244.

I. *Where the Plaintiff is in default, Stay of Proceedings.*

The Court of Chancery had jurisdiction to stay all proceedings in a cause until the plaintiff had made any discovery which he was called upon by the order of the court to make: *Republic of Liberia v. Roye*, 1 App. Cas. 139, p. 143. See further as to this case, *post*, p. 589: and generally as to staying proceedings in suits where the plaintiffs were a corporate or other body and were required to give discovery, *ante*, p. 76.

The order for inspection in App. K. Jud. Act (*post*, App. Ch. I.) directs that in the meantime all further proceedings be stayed: and see *Rawson v. Samuel*, *ante*, p. 173. The form of summons for an order for an affidavit of documents against a plaintiff given in Ch. Arch. p. 269 asks for a stay: and the order in use at common law before the Jud. Act directed a stay: but not the form given in the Appendix to the Jud. Act (*post*, App. Ch. I.).

See as to staying proceedings in actions on marine policies in favour of underwriters, *ante*, p. 559.

Where the plaintiff was in default in answering a cross bill for discovery, proceedings in his own suit would be stayed. And in *Brancker v. Carne*, L. R. 2 Eq. 610, where the defendant had filed a concise statement and interrogatories, pro-

ceedings were stayed until answer, though the plaintiff was not in default.

See as to staying proceedings in a common law action where the defendant filed a bill of discovery in aid of his defence, *post*, p. 617.

See as to staying proceedings where particulars are ordered Ord. XIX. r. 8, and the form of order in the Appendix to the Jud. Act.

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## II. *Where either Party is in default, Attachment.*

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment: Order XXXI. r. 21 (see the other part of the rule *post*, Sections III. and IV.).

Qu. whether sequestration would be issued against a peer, or member of parliament, or against a corporation, as under the chancery practice: see a case against a company under the C. L. P. Act, *Lacharme v. Quartz Co.* cited *ante*, p. 86.

Where a plaintiff is shown not to be in a condition to make an affidavit, the court will not grant an attachment against him: Cotton, L. J. in *Raffalovitch v. Wilson*, 7 Q. B. D. p. 361.

Where an answer is not so palpably insufficient as to show want of bona fides the proper course is to proceed under rule 11: see *Kennedy v. Lyell*, *post*, p. 588: and see *ante*, p. 146: and the common law practice *post*, p. 586.

After a fourth affidavit of documents by the defendant had been held insufficient, no order being made for a further affidavit, the plaintiff was held to be justified in moving for attachment, for it was the only means of obtaining a further affidavit: *Thomas v. Palin*, 21 Ch. D. 360: and see *ante*, p. 148 as to the practice in the case of a fourth insufficient answer. After default by a defendant in complying with an order for a further affidavit of documents, a motion for attachment was ordered to stand over until a summons taken out by the defendant for further time had been heard:

*Litchfield v. Jones*, W. N. 83, p. 164: but in another case the order was made, but not to be drawn up for fourteen days: *Hampden v. Wallis*, 28 S. J. 532: and see the common law practice *post*, p. 586.

A defendant in equity would not be kept in custody until he answered the bill unless the court was satisfied that justice could not be done to the plaintiff without discovery or further discovery: 1 Will. IV. c. 36, s. 15: rule 12: as where a plaintiff sought discovery of acts of misconduct of his partner: *Maitland v. Rogers*, 14 Sim. 92: or particulars of a mortgagor's dealings with the mortgaged estate in a foreclosure action in order to get the necessary parties before the court: *Potts v. Whitmore*, 8 Beav. 317: or discovery from a trustee for the purpose of charging the solvent estate of a co-trustee: *Aveling v. Martin*, 17 Jur. 271: and see *post*, p. 619 as to the answer to an action for discovery. Except in cases of that kind the defendant could procure his discharge by submitting to have the bill taken pro confesso: 1 Will. IV. c. 36, s. 15: rule 12: Consol. Ord. XXII. r. 5. And further if within ten days after he was taken into custody or thirty days after arrest by the sheriff the plaintiff did not bring him to the bar of the court he was entitled to his discharge without payment of the costs of the contempt: but if within eight days after his discharge he did not put in his answer the plaintiff might apply for a fresh attachment: Consol. Ord. XII. rr. 2, 3. By Consol. Ord. XVI. r. 19 (see *ante*, p. 148), it was provided that after a third insufficient answer the party might be ordered to be examined on interrogatories and stand committed until he should have perfectly answered them (but in the case of interrogatories in chambers, see *ante*, p. 568, there was no committal until after a fourth insufficient examination, this order not applying to such a case, and following out what was believed to be, but qu. see *Liverpool v. Chippendall*, *ante*, p. 148, the old practice in the case of insufficient answers before that order was made: *Allfrey v. Allfrey*, 12 Beav. 620: *Hayward v. Hayward*, Kay, App. p. xxxiv.): but this rule did not apply to an affidavit of documents: *ante*, p. 148.

On clearing his contempt the party is entitled to an order of course for his discharge, on payment of the taxed costs of the attachment if so directed by the order for attachment, and if not so directed on payment of 13s. 8d.: *Abud v. Riches*, 2 Ch. D. 528.

The court would not detain a defendant until the sufficiency of the answer had been decided on, unless after three insufficient answers: *Bailey v. Bailey*, 11 Ves. 151: and see *ante* as to the practice after three insufficient answers.

Where the answer was subsequently found insufficient the plaintiff was entitled to resume the process of contempt where it left off: Dan. Ch. Pr. 432. But in a case since the Judicature Act where an order for attachment had been obtained against a defendant for default in filing an affidavit of documents but had not been put in force, and the defendant had subsequently put one in and obtained an *ex parte*



order for his discharge, Bacon, V. C. considering that there was no analogy between the answer in chancery and the affidavit of documents in this respect, refused to follow the old chancery practice, and holding the affidavit to be insufficient and the ex parte order to have been obtained on a misrepresentation discharged it, attachment not to issue for a fortnight: *Price v. Price*, 48 L. J. Ch. 215.

On getting notice of motion for attachment against him the party must, if he wish to prevent the motion being brought on, not only file his affidavit of or give discovery but he must tender a fixed sum for costs or offer to pay the taxed costs: *Thomas v. Palin*, 21 Ch. D. 360, p. 363. At common law where the answer was put in after the proper time but before the application for attachment, the attachment would not be granted: *Curran v. Elphinstone*, 4 W. R. 50.

The costs of the attachment are in the discretion of the judge, but the party against whom the order is made is generally ordered to pay the costs: the order itself should provide for the costs: but a separate application, at the applicant's own expense, may be made: *Abud v. Riches*, 2 Ch. D. 528.

Attachment would not be issued at common law\* where there was no wilful disregard of the authority of the court though there might be no legal excuse: *Windle v. Lane*, 29 L. J. Ex. 245: or where the party had not been guilty of any neglect: *Von Hoff v. Hoerster*, 27 L. J. Ex. 299 (foreigner not in England, defendant). An order was made in *Seafeld v. Pratt*, 5 L. T. 674: and see *Turk v. Syme*, 29 L. J. Ex. 54: and see *ante*, p. 584, as to the practice since the Jud. Act.

The order for attachment would generally be directed to lie in the office a week in order to give the party a further opportunity of giving the discovery: *Windle v. Lane*: *Geary v. Buxton*, 29 L. J. Ex. 280: *Coster v. Blackburn*, L. R. 8 Q. B. 54: and see *ante*, p. 585, as to the practice in equity.

In one case section 46 of the C. L. P. Act (see *ante*, p. 39, n.) was made use of in connection with a motion for a rule nisi against a defendant for attachment for default in answering, in order to assist the court on the further hearing of the rule: *Morgan v. Alexander*, 32 L. T. 34 (the defendant being an underwriter whose existence was in doubt): see also *Moline v. Tasmanian R. Co.* cited *ante*, p. 75, where it was made use of for the purpose of enabling the court to determine whether to order a further answer.

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\* By section 51 of the C. L. P. Act, 1854, any party or officer omitting without just cause sufficiently to answer all questions as to which a discovery might be sought within the proper time (ten days) or such extended time as a court or judge might allow should be deemed to have committed a contempt of court and liable to be proceeded against.

Where an order for an affidavit of documents was under appeal, on motion for attachment Kay, J. made the order but directed that it should not be drawn up at all if the appeal should succeed, and if it should fail not until omission to file an affidavit within two days after the appeal, the costs in case of the appeal succeeding to be reserved: *Mellor v. Thompson*, W. N. 83, p. 128.

An order for an account under Ord. XV. or for the names of partners in a firm under Ord. XVI. r. 14 is not an order for discovery, and cannot therefore be enforced by attachment under Ord. XXXI. r. 21: *Pyke v. Keene*, 24 W. R. 322.

Ord. LII. r. 4, requiring service of copies of the affidavits to be used on the motion for attachment with the notice of motion applies to this rule: *Litchfield v. Jones*, 32 W. R. 288.

Service of an order for interrogatories\* or discovery or inspection made against any party or his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order: Rule 22. A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment: Rule 23.

Ord. XLI. r. 5, providing that the copy of the order must be endorsed with a notice to the effect that in the event of disobedience the party will be liable to process of execution applies not only to orders requiring personal service, but also to cases where as under these rules the order can be served on the solicitor: nor is a failure to so indorse it waived by any acknowledgment of notice, as by taking out a summons for time: *Hampden v. Wallis*, W. N. 84, p. 138: 32 W. R. 808: reversing Chitty, J. 28 S. J. 532.

It was held that the four days' order in *Joy v. Hadley* (see *ante*, p. 569) was within the terms of this rule.

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\* The old rule did not expressly include interrogatories, but it was held to apply to an order to answer interrogatories: *Re Mulcaster*, 47 L. J. Ch. 609.

III. *Where the Plaintiff is in Default, Dismissal of the Action.*

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment (see as to attachment *ante*, Section II.). He shall also if a plaintiff be liable to have his action dismissed for want of prosecution . . . . and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly : Rule 21.

This rule is not imperative : *Hartley v. Owen*, 34 L. T. 752 (cited *ante*, p. 88) : *Kennedy v. Lyell*, W. N. 82, p. 137. An order will not be made unless the court is satisfied that the plaintiff is endeavouring to avoid a fair discovery : *Danvillier v. Myers*, W. N. 83, p. 58. Where an answer is not so palpably insufficient as to show want of bona fides, the proper course is to proceed under rule 11 and not move to dismiss the action : *Kennedy v. Lyell* (second insufficient answer) : and see *ante*, p. 584.

In *Danvillier v. Myers* the plaintiff having already produced some books before the referee was ordered to make a further production : on motion to dismiss the action for non-compliance with this order, the Court of Appeal allowed the motion to stand over to enable the plaintiff to file an affidavit : the plaintiff put in an affidavit to the effect that he had no other documents relating to the particular matter : the court on inspecting the books already produced was satisfied that the plaintiff was not making fair discovery and was keeping back documents, and affirmed the order dismissing the action.

Where an order for an affidavit of documents is made on two or more plaintiffs, and they have not all joined in the affidavit, the court will not dismiss the action if it is shown satisfactorily that the plaintiffs who have not joined are not in a condition to make an affidavit : Cotton, L. J. in *Raffalovich v. Wilson*, 7 Q. B. D. p. 361.

See also *Hartley v. Owen*, cited *ante*, p. 88, where an order was refused.

The court will not go on staying proceedings for ever. It has the right to go further and to say that after a proper interval the proceedings which have been stayed shall be altogether expelled from the court and any property which has been taken possession of be restored to the person from

whom it was taken : *Republic of Liberia v. Roye*, 1 App. Cas. pp. 143—144 (see further as to this case, *ante*, p. 86).

In *Princess of Wales v. Liverpool*, 3 Sw. 567, Lord Eldon made an order for the bill to be dismissed in default of production of a certain document within a limited time (see further as to this case, *ante*, p. 248).

The order generally allows a further limited time for giving the discovery : see *Republic of Liberia v. Roye* : *Carter v. Stubbs*, *post* : but see an exceptional case *Danvillier v. Myers*, *ante* : see also as to striking out the defence *post*, p. 590.

The whole action will be dismissed although the discovery in respect of which the plaintiff is in default may have reference only to a particular portion of the claim : *Danvillier v. Myers*.

The order will be made although the plaintiff's default is not in giving no discovery but in giving insufficient discovery : see *Kennedy v. Lyell*, W. N. 83, p. 137 : as in chancery, for an insufficient answer was no answer : Dan. Ch. Pr. 448, citing *King v. Bryant*, 6 L. J. Ch. 151 : *Davis v. Davis*, 2 Atk. 24 : *Turner v. Turner*, 4 Ves. 419.

The time for appealing against an order dismissing the action for want of prosecution may be enlarged under Ord. LXIV. r. 7, even after the order has taken effect and the action has become thereby dismissed : and the judge having so enlarged the time may vary the order : *Carter v. Stubbs*, 6 Q. B. D. 116 : *Burke v. Rooney*, 4 C. P. D. 226 : as by extending the time for giving the discovery : *Carter v. Stubbs*, where, an order having been made on the plaintiff to answer interrogatories within seven days, and in default his action to be dismissed, and his answer having been filed on the eighth day, the order was varied by substituting fourteen for seven days : and see *Gibson v. Sykes*, 28 S. J. 533.

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IV. *Where the Defendant is in Default, striking out his Defence.*

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall be liable to attachment (see as to attachment *ante*, Section II). He shall also . . . . if a defendant be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly: Rule 21.

The practice as to taking bills pro confesso in chancery was regulated by 1 Will. IV. c. 36 and Consol. Ord. XXII. An order could only be made where the defendant was deemed to have absconded to avoid or to have refused to obey the process of the court: but where the plaintiff was unable with due diligence to procure a writ of attachment or any subsequent process for want of answer to be executed against him by reason of his being out of the jurisdiction of the court or being concealed or for any other cause, the defendant was to be so deemed. The court had a discretion as to making the order. See as to where the defendant was resident abroad *Lulueta v. Vincent*, 15 Beav. 272: *Jarvis v. Shand*, 13 L. T. 403: *Hele v. Ogle*, 2 Ha. 623.

This rule is not imperative: see *ante*, Section III. as to where the plaintiff is in default: and *Gibson v. Sykes*, 28 S. J. 533, where an order striking out a defence and counter-claim and entering judgment for the plaintiff for default in answering interrogatories was reversed on appeal. Orders for striking out the defence were made in *Twycross v. Grant*, W. N. 75, pp. 201, 229, for default in answering: in *Anon.* W. N. 76, p. 204, and *Fisher v. Hughes*, 25 W. R. 528, for default in filing an affidavit of documents.

The order generally allows the party a further limited time for giving the discovery: *Twycross v. Grant*: *Anon.*: and see *Gibson v. Sykes*: and see as to dismissing the plaintiff's action *ante*, Section III.: as in chancery where an order was made to take the bill pro confesso: *Courage v. Wardell*, 4 Ha. 481.

In chancery after an order to take the bill pro confesso had been obtained the court would discharge the order if there had been no unreasonable delay, and the defendant came in upon any reasonable ground of indulgence: but it might insist upon looking at the answer which was proposed to be put in in order to see that it was a proper one: Dan. Ch. Pr. 448; *Hearne v. Ogilvie*, 11 Ves. 77.

If the defence is struck out the defendant is in default and Ord. LVII. applies : *Fisher v. Hughes*, 25 W. R. 528.

So it is conceived the plaintiff could if necessary get an extension of time for any step he may wish to take in the action : see for instance *Westminster, &c. Co. v. Clayton*, 12 W. R. 124, where the time for amending the bill was extended until ten days after the defendant should have filed his affidavit of documents. See also Ord. XIX. r. 8 as to particulars.

## CHAPTER VIII.

## COSTS.

I. *Generally.*

The following rules deal with the costs of discovery (see as to the rules dealing with the preliminary deposit as security for the costs of discovery *post*, Section II.):—

In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for enquiry, that such interrogatories have been exhibited unreasonably, vexatiously or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in default: Ord. XXXI. r. 3.

The court or a judge may at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in court or at chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the court or judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so: and in the Queen's Bench Division the master shall make such order as may be required to effect the object of this regulation: Ord. LXV. r. 27 (20).

In every cause, or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court or a judge, be secured in the first instance as provided by Rule 26 of this Order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or if there is no trial, to the court or a judge, or shall appear to the taxing officer, to have been reasonably asked for: Ord. XXXI. r. 25: see as to rule 26 *post*, Sect. II.

As to inspection of documents under Ord. XXXI. r. 15, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection: Ord. LXV. r. 27 (17).

See further as to the costs of inspection *ante*, p. 175: of copies *ante*, p. 174: of deposit in court *ante*, pp. 167, 168.

See as to the costs of inspection of property *ante*, p. 577.

See as to the costs of a prolix affidavit of documents *ante*, p. 229.



See as to the costs of unnecessary discovery by way of interrogatories *ante*, pp. 107, 122.

See as to the costs of prolix or unnecessary answers *ante*, p. 123.

The costs of giving discovery are (subject to the matters stated in the above references, and see in particular *Mitchell v. Darley, &c. Co.* 10 Q. B. D. p. 458, where it would seem to have been laid down that the judge must direct how the costs of inspection are to be paid or they cannot be recovered, and that the common practice was to deal with the costs of answering interrogatories or inspecting documents before answer or inspection : but *qu.* see *ante*, p. 175) costs in the cause. The costs of perusing interrogatories before the hearing of a successful demurrer to the whole bill were disallowed, for perusal was unnecessary : *Ernest v. Partridge*, 2 N. R. 232.

The costs of giving discovery are incident to the application for the discovery when provision is made for them in the order made on the application, and they are therefore in the judge's discretion, and not subject to appeal, and fall within section 149 of the Jud. Act, 1873 : *Mitchell v. Darley, &c. Co.* : and see Ord. LXV. r. 1.

The costs of drawing and delivering interrogatories are (subject as above) costs in the cause. The costs of interrogatories prepared but not used will not as a rule be allowed unless under special circumstances, as where an arrangement was come to between the parties to save the expense of an answer by admissions : *Davies v. Marshall*, 1 Dr. & Sm. 564.

The costs of applications for discovery, if the application is allowed, are made costs in the cause by the order. This was so even where special leave was given under the old rules to interrogate after the close of the pleadings : *London and Provincial, &c. Co. v. Davies*, 5 Ch. D. 775.

See as to the costs of applications having reference to the place of production *ante*, p. 173.

See as to the costs of applications for further time for giving discovery *ante*, p. 143.

On applications for further answers to interrogatories the  
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ordinary rule is to apportion the costs of the application according to the relative success of the parties: but the costs have sometimes been made costs in the cause: see *Re Sutcliffe, Alison v. Alison*, 44 L. T. p. 548.

See as to the costs of a *vivâ voce* examination under Rule 11, *Vicary v. G. N. R. Co. ante*, p. 147.

See as to the costs of attachment *ante*, p. 586.

## II. Preliminary Deposit as Security for Costs.

Rule 25. See *ante*, p. 592.

Rule 26. Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into court to a separate account in the action, to be called "security for costs account" to abide further order, the sum of 5*l.* and, if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court, to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into court, and the time (see as to this *ante*, p. 143) for answering or making discovery shall in all cases commence from the date of such service.

Rule 27. Unless the court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "security for costs account" in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but in the event of the court or judge ordering him to pay the costs of the cause or matter, the amount in court shall be subject to a lien for the costs ordered to be paid to any other party.

See Rule 27a, *post*, p. 643.

The general principle of these rules is that a person seeking discovery is to give security for costs, the object being to put a check on applications for discovery, and that a sort of pledge should be given that it is really required: *Compagnie, &c. du Pacifique v. Guano Co.* W. N. 83, p. 166: *Smith v. Reed*, W. N. 83, p. 196: *Henderson v. Ripley*, W. N. 84, p. 85.

The deposit is intended for the protection of the clients themselves: *Aste v. Stunmore*, 13 Q. B. D. 326, p. 329. The rule as to deposit is not imposed solely for the benefit of the party from whom the discovery is sought: *Hall v. Liardet*,

W. N. 83, p. 175, approved in *Aste v. Stunmore*, p. 329: and see this case further cited *ante*, p. 91, in reference to the object of the leave of the court being required to administer interrogatories under the new Rule 1.

The liability of the party to make the deposit cannot therefore be waived by the party from whom the discovery is sought: that is to say, a judge is not bound to dispense with the deposit and to "order otherwise" (under Rule 25) simply because the parties choose to agree that there shall be no deposit: *semble*, the judge has a discretion in such a case: *Aste v. Stunmore*, pp. 328—330 (where the parties were rich).

It is no reason for relieving plaintiffs from giving security that as foreigners they have already been compelled to give security for costs of the action: *Compagnie, &c. du Pacifique v. Guano Co.* W. N. 83, p. 166.

Poverty is a ground for dispensing with security for costs: *Burr v. Hubbard* (cited *ante*, p. 93): *Compagnie, &c. du Pacifique v. Guano Co.*: *Smith v. Went* (cited *ante*, p. 93): *Henderson v. Ripley*, where the application to dispense was refused, the action being supported by public subscription.

Where interrogatories are delivered to more than one defendant a deposit must be made in respect of each set of interrogatories that he delivers, that is to say in respect of each defendant: *Smith v. Reed*, W. N. 83, p. 196: *Campbell v. Poulett*, W. N. 84, p. 48. But *contra* apparently in *The Wickham*, 53 L. T. 236, a co-ownership action, where, the plaintiff having administered interrogatories to be separately answered by each of thirty-four defendants, Butt, J. held that Ord. XXXI. r. 26 gave no power to make such an order.

But one deposit is sufficient on an application for an order for an affidavit of documents against plaintiffs: *Campbell v. Poulett*.

Discovery under Rules 25 and 26 means such discovery as has been referred to in the previous rules of this Order: *Law v. Budd*, W. N. 83, p. 166.

No security for costs is necessary before application for an order for an affidavit and production of ship's papers in

actions against underwriters, see *ante*, p. 560, for such an order is a matter of course, and differs from ordinary orders for discovery : *ibid*.

The interrogatories may be set aside if the proper deposit is not made : *Smith v. Reed*, W. N. 83, p. 196. But qu. as to the necessity for such an order, for the party is not bound to give discovery unless and until the deposit is made : see Rule 26.

The deposit is security for the general costs of the action, and therefore cannot be paid out to the party in the event of his subsequently determining to dispense with the discovery : *Jubb v. Bibbs*, W. N. 83, p. 208 ; see also *Bates v. Burchell*, 28 S. J. 443.

## CHAPTER IX.

## MISCELLANEOUS.

I. *As to Discovery being on Oath.*

All discovery must be on oath except in the case of persons exempted by statute\* (see *post* as to persons entitled to the privilege of peerage, officers of the Crown, and foreign sovereigns). See the rules of Ord. XXXI. *post*, App. Ch. II.

The answer in chancery must have been put in upon oath except in the case of persons entitled to the privilege of peerage who answered on protestation of honour, corporations aggregate who answered under their common seal, and persons exempted from taking an oath by any statute in that behalf: Consol. Ord. XV. r. 6: and see Redes. Pl. 10 and cases there cited as to Quakers, &c.: and *post* as to persons entitled to privilege of peerage.

Qu. as to persons entitled to the privilege of peerage who answered in chancery on protestation of honour: Consol. Ord. XV. r. 6: Beam. Ch. O. pp. 105, 261: Redes. Pl. 10: *Meers v. Stourton*, 1 P. W. 146: 2 Salk. 512: *Dawson v. Ellis*, 1 J. & W. 526: *Peacock v. Bedford*, 1 V. & B. 187: *Robinson v. Rokeby*, 8 Ves. 601 (Irish peer): *Gilpin v. Southampton*, 18 Ves. 470 (peeress): *Hamilton v. Gerrard*, Prec. in Ch. 92 (peeress—production of documents on honour as part of her answer).

A bishop answered on oath: *Sarum v. Sarum*, Toth. 74.

See as to the Att.-Gen. and other officers of the Crown *ante*, p. 70.

See as to a foreign sovereign *ante*, p. 72.

An answer to interrogatories made abroad without oath but by way of declaration before a burgomaster was allowed

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\* By section 100 of the Jud. Act, 1873, oath shall include a solemn affirmation and statutory declaration.

to be filed by consent since the Jud. Act: *Bacon v. Turner*, W. N. 76, p. 292.

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## II. *As to Appeals from Orders for Discovery.*

Appeals except on points of principle are nearly always fruitless: the exercise of the judge's discretion will not be interfered with unless he has proceeded on a wrong principle: see *ante*, p. 101: *Eade v. Jacobs*, 3 Ex. D. p. 337. It was so at common law: see Day, C. L. P. 308 and *ante*, p. 101.

See as to appeals where judges at the request of the parties inspect documents to decide as to their production *ante*, p. 233.

In early cases it seems an order for production would not be stayed pending its appeal unless in exceptional circumstances: see *Walburn v. Ingilby*, 1 M. & K. 79: *Storey v. Lennox*, 1 M. & C. 685. But the practice is now otherwise. In *Kelly v. Hutton*, 15 W. R. 916, orders had been made for inspection and for deposit in court: the documents were deposited, but pending appeal it was ordered that the party should not be at liberty to inspect them. So an order for inspection of a manufacturing process was stayed pending appeal therefrom: *Flower v. Lloyd*, 20 S. J. 584.

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## III. *As to Discovery from Foreigners or Persons resident Abroad.*

Interrogatories would be allowed to be delivered to a plaintiff foreigner resident abroad at common law: *Pohl v. Young*, 25 L. J. Q. B. 23.

An order for discovery of documents will be made in an action in rem against the owners of a foreign ship resident abroad but reasonable time will be allowed for giving the discovery: *The Emma*, 34 L. T. 742.

Where a defendant was out of the jurisdiction it was said under the old rules that leave to serve interrogatories, if any

should be delivered, should be provided with the leave to serve the writ: *Young v. Brassey*, 1 Ch. D. 277. And in an action where under the present Rule 1 no order is necessary to interrogate the same course should be adopted.

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#### IV. *As to the Right to Discovery where the Pleadings are amended.*

In respect of new matter introduced by amendment the party has the same right to discover as in respect of the original pleadings. A plaintiff in chancery was entitled to have a further affidavit of documents, where he had amended his bill, relating to the further matters mentioned in the amendments: *Warden v. Peddington*, 32 Beav. 639. So also he had an absolute right to file fresh interrogatories in respect of the new matter introduced by amendment: Dan. Ch. Pr. 408: or, before answer put in to the original bill, to get an order of course to amend the interrogatories as well as the bill: Braithw. Pr. 309: and see *ante*, p. 149.

The amendment must have been substantial: the matter must have been really new: see *Wich v. Parker*, 22 Beav. 59, pp. 66—68: *Duncombe v. Davis*, 1 Ha. 184, p. 193; *Hill v. Northern Buenos Ayres, &c. Co.* 41 L. J. Ch. 69.

The same interrogatory may bear a different meaning when tested by reference to the amended pleading. Though where the bill was amended the defendant could not be ordered to answer an interrogatory already (technically or actually) sufficiently answered, this was not so where its purport had been enlarged or altered by the amendment: see *A. G. v. Rees*, 12 Beav. 50: *Partridge v. Haycroft*, 11 Ves. p. 581: *Mazarredo v. Maitland*, 3 Mad. pp. 71—72: *Duncombe v. Davis*, pp. 193—194: *Wich v. Parker*, p. 68: Dan. Ch. Pr. 663.

The following technicality in the old chancery practice can have no place under the present practice:—

As to the matter which was also in the original bill a plaintiff in chancery by amending his bill admitted the answer to the original bill to be sufficient and therefore was not entitled, without special leave: *Denis v. Rochusen*,



4 Jur. N. S. 298: Dan. Ch. Pr. 408: which would be refused where there was laches: *Southampton, &c. Co. v. Rawlins*, 12 W. R. 285: 10 Jur. N. S. 118: to interrogate thereto: Dan. Ch. Pr. 408—409, 663—664: *Drake v. Symes*, 2 D. G. F. & J. 81: *Ovey v. Leighton*, 2 S. & S. 234: *Wich v. Parker*, 22 Beav. 59; nor did it make any difference that he had not interrogated at all to his original bill and the defendant had put in a voluntary answer: *Denis v. Rochusen*, 4 Jur. N. S. 298: but otherwise if he amended his bill before the expiration of the time for filing interrogatories to the original bill: Dan. Ch. Pr. 408.

### V. *As to Reading part of an Answer to Interrogatories.*

Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer\* of the opposite party to interrogatories without putting in the others or the whole of such answer\*: provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in. Rule 24.

Part even of a paragraph may be read alone: see Cotton, L. J. in *Lyell v. Kennedy* (cited *ante*, p. 392).

When an admission is read everything ought to be read which is fairly connected with that admission, but not a passage not connected in sense or substance with that admission, though in his answer the party may have claimed to do so: see Cotton, L. J. in *Lyell v. Kennedy* (cited *ante*, p. 392), where the party craved leave to refer to his former answer to other interrogatories. See further as to this case in connection with this point *ante*, pp. 117, 120.

In chancery on a bill for relief a plaintiff was entitled to read any part of the answer without reading the whole. But where he read any passage, the defendant was entitled to have read any explanatory passages whether connected in point of grammatical construction or separated by other passages referring to distinct subjects: *Nurse v. Bunn*, 5 Sim. 225: or where the plaintiff read a passage relating to one part of a subject, the defendant might read another passage relating to another part of the subject, though not in the same sentence, if it were connected in meaning with the first passage: *Bude v. Whitchurch*, 3 Sim. 562: and see *Miller v. Gow*, *post*: but not another passage though connected by "but" or "and," unless explanatory: *Davis v. Spurling*, 1 R. & M. p. 68. "Where a plaintiff chooses to read a passage from a defendant's answer he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage or to a fact stated in any other passage, that other passage must be read also: but it is to be read only for the purpose of explaining, so far as

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\* The words "or any part of the answer" and "or the whole of such answer" were not in the old rule, see *ante*, p. 118.

explanation may be necessary, the passage previously read in which the reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read:" Lord Eldon in *Bartlett v. Gillard*, 3 Russ. 156, p. 157. See also *Ormond v. Hutchinson*, 13 Ves. p. 53; and *Connop v. Hayward*, *post*. See also *post* as to reading the interrogatories in the case of an answer to a bill of discovery.

Where a defendant admitted the receipt of certain sums of money, and in a subsequent part of his answer discharged himself, he was unable to use it for the purpose of discharging himself except perhaps where the discharge followed immediately in the same sentence as if he admitted receiving certain sums which sums he had paid, &c. *Ridgway v. Darwin*, 7 Ves. 404; or, if the answer stated that on a particular day he received a certain sum and paid it over, that might discharge him, but not if the payment was on a subsequent day, for that was a different transaction: *Thompson v. Lamb*, 7 Ves. 587; or at other times: *Blount v. Barrow*, 4 B. C. C. p. 75. Nor where he charged himself in one schedule could he avail himself of his alleged disbursements in another schedule: *Boardman v. Jackson*, 2 Ball & B. p. 385. See also *Robinson v. Scotney*, 19 Ves. 582: *Audley v. Audley*, 1 Vern. p. 193: *Hampton v. Spencer*, 1 Vern. p. 287: and *Connop v. Hayward*, 1 Y. & C. C. C. 33, where an executor admitting assets was not allowed to read a passage alleging payment of a legacy, there being no sufficient connection.

Where a plaintiff was surprised by being compelled to read a further passage he was usually allowed to withdraw the original passage from the evidence: *Freeman v. Tatham*, 5 Ha. p. 337: *Allfrey v. Allfrey*, 1 M. & G. p. 93: but it was in the discretion of the judge, and leave would sometimes be refused: *Freeman v. Tatham*.

The answer to a cross bill for discovery or to interrogatories founded on a concise statement was read and used in the same way as an answer to a bill praying relief: Consol. Ord. XIX. r. 6.

Except in that particular case the whole of an answer to a bill of discovery must be read if any part were read: *Miller v. Gow*, 1 Y. & C. C. C. 56: *Ormond v. Hutchinson*, 13 Ves. p. 53: *Boardman v. Jackson*, 2 Ball & B. p. 386: *Butterworth v. Bailey*, 15 Ves. p. 362. And so the interrogatories must be put in if the party insisted upon it for the purpose of explaining his answer: *Fleet v. Perrins*, 37 L. J. Q. B. 233: and also the narrative part of the bill, where under the old practice the defendant was bound to answer it: *Pennell v. Meyer*, 2 M. & R. 98.

On the same ground where a party at law obtained production of a document by means of a bill of discovery the

judge would not allow him to use the document without also using the answer, unless a court of equity had made an order for its production (which should not be done on a bill of discovery: *Brown v. Thornton*: though otherwise on a bill for relief where a trial at law was directed: see *Hylton v. Morgan*, cited *ante*, p. 275), for it was a part of the answer: *Brown v. Thornton*, 1 M. & C. 243: and see *post*, p. 611.

In equity on a bill for relief it was different; for though different parts of an answer could not be severed if they were in substance connected (and see *ante*), the rule was not to read the part of the answer referring to or explaining or qualifying the document: *Miller v. Gow*, 1 Y. & C. C. C. 56: and see *Taylor v. Salmon*, 3 M. & C. 422.

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VI. *As to any Connection between the Obligation to give and the Right to require Discovery—as to any Priority of Right of either Plaintiff or Defendant to require Discovery.*

It is obvious as has already been pointed out (*ante*, p. 133) that it may be a great advantage to a party to obtain discovery from his opponent before he gives discovery: and in particular this is so where the discovery which he is called on to give is of his own case, and he relies for his statement in detail of that case upon what he may be able to fish out by means of discovery: see *ante*, pp. 13, 98 and 461, as to a party's requiring discovery before he has stated his own case. See as to the position of a party who alleges that he is unable to give the required discovery without getting certain discovery from his opponent *ante*, p. 134.

Under the old chancery practice the plaintiff had a priority. The defendant could not file a concise statement and interrogatories under section 19 of the Ch. P. Act, or (see the exceptional cases cited *ante*, pp. 247—251, under the earlier practice) obtain an order for discovery or production of documents under section 20 until he had put in his answer where required to, and where exceptions were filed to his answer he could not get his interrogatories (or a cross bill if he filed one) answered, or the documents discovered or produced, until a limited time after his answer had been found sufficient: see *ante*, pp. 97, 161—162: and so the time for the plaintiff's putting in his answer was extended until after the hearing of an appeal against an order for production by the defendant of certain documents which it was necessary he

should see for the purpose of his answer: *Holmes v. Baddley*, 7 Beav. 69. In chancery however the answer and defence were contained in the same document, and therefore there was a reason for this practice which does not now, or at all events to the same extent (see *ante*), obtain, namely that the defendant should not have discovery until he had stated his own case: see *ante*.

It is to be noted however that in *Baily v. Dunkerley*, 6 W. R. 835, it was said by Kindersley, V. C. that the spirit of the Ch. P. Act was that if a defendant was required to give discovery till that was given he should not have the benefit of an order for production by the plaintiff.

In *Noel v. Noel*, 11 W. R. 791, a defendant was held entitled to an order for an affidavit of documents whether he had himself put in a further affidavit of documents in compliance with an order or not: but qu. as to the time for filing it, see *Haldane v. Eckford*, *post*.

A plaintiff lost his right to discovery if he omitted to file his interrogatories within the proper time (a limited time after filing his bill), and in the meantime the defendant had filed his interrogatories: *Garwood v. Curtis*, 12 W. R. 509: 10 Jur. N. S. 199; for where they were not filed within the proper time the defendant was in the position of a person not required to answer, and this was not altered by the indulgence given to the plaintiff by the court allowing him a further time to file his interrogatories: *ibid.*; or if he amended his bill after a cross bill had been filed: *ibid.*: *Gray v. Haig*, 13 Beav. 65: *Noel v. King*, 2 Mad. 392.

The rule that a party in contempt cannot move until he has cleared his contempt did not apply to prevent a plaintiff from using the process of the court to compel an answer or prosecute his suit, if the defendant did not apply specially that proceedings might be stayed: *Wilson v. Bates*, 3 M. & C. 197, p. 204; nor a defendant from taking any measures necessary for his defence: *Fry v. Ernest*, 12 W. R. 97 (filing concise statement and interrogatories while in contempt for payment of costs in another suit). Where production of documents was required by a defendant for the purpose of defending himself, James, V. C. considered that he had no jurisdiction to refuse an order, but fixed the time for filing the affidavit and producing the documents respectively for seven days after an affidavit should be filed and documents produced under an order in respect of which the defendant was in contempt: *Haldane v. Eckford*, L. R. 7 Eq. 425. A plaintiff in custody for contempt in respect of costs was allowed to sue out attachment against a defendant for default in answering: *Wilson v. Bates*.

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### VII. *Exhibits or Documents given in Evidence.*

A party had no right in the absence of special circumstances to production or inspection, before the hearing, of an exhibit however it had been proved, except for cross-examination: Dan. Ch. Pr. pp. 791—792, referring to *Forrester v. Helme*, M'Cl. 558: *Lord v. Colvin*, 2 Drew. 205: 5 D. G. M. & G. 47: *Fencott v. Clarke*, 6 Sim. 8: *Wiley v. Pistor*, 7 Ves. 411: *Bell v. Johnson*, 1 J. & H. 682; unless perhaps where the deposition proving it set it out verbatim: Dan. Ch. Pr. 781, 791, referring to *Hodson v. Warrington*, 3 P. W. 35: and so made it part of the deposition: *ibid.*

In *Hodson v. Warrington* the order was refused, for it remained at the defendant's election whether he would use it or not. In *Davers v. Davers*, 2 P. W. 410, the refusal was based on the general ground that being the evidence of the defendant's title the plaintiff had no right to see it before the hearing for the purpose perhaps of picking holes in it: and see Wigr. Pl. 349.

In these two cases the documents were deeds. In *Wiley v. Pistor* they were letters: but no distinction was made.

See as to production of exhibits at common law *Attenborough v. Clark*, 2 H. & N. 588: *Tebbut v. Ambler*, 7 Dowl. P. C. 674: Arch. Pr. 1168: Lush, Pr. 838: and as to production of documents given in evidence for the purpose of moving for new trial, or of an appeal *post*, p. 605.

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### VIII. *Discovery or Production for the Purpose of an Appeal or of a new Trial.*

Discovery or production of documents will, if necessary, be ordered for the purpose of an appeal: see *Re National Funds Assurance Co.* cited *ante*, p. 297. In *Benyon v. Godden*, W. N. 77, p. 257, a motion was made for production of certain documents which had been put in at the trial (see further *post* as to production for the purpose of a new trial): it was said that the proper course was to give notice to produce, to apply for copies, and if the party refused, to apply on the hearing of the appeal. All the parties to the appeal must be served with notice of any application for discovery: *ibid.*

But a bill of discovery could not be filed in aid of an appeal to the Judicial Committee of the Privy Council, at all events without some order or intimation from that court to the effect that they desired to have fresh evidence: *Wood v. Hitchins*, 3 Beav. 504, pp. 510—511: and see *Re National Funds Assurance Co. ante*, p. 297.

After verdict at law with proper and apt charges a bill might have been filed in chancery to compel production of documents for the purpose of a new trial: but a bill stating only that a verdict passed against the plaintiff and praying a discovery without imputing a violation of duties arising from the relation between the parties (as landlord and tenant, and refusal to produce at the trial) could not be sustained: *Field v. Beaumont*, 1 Sw. 204, p. 209, referring to *Whitmore v. Thornton*, 3 Pri. 231, p. 248. Lord Eldon in this case refused to order production on the ground of delay. See also *Barbone v. Brent*, 1 Vern. 176: and *Sewel v. Freeston*, 1 Ch. Ca. 65.

See as to production of documents given in evidence for the purpose of moving for a new trial: *Pratt v. Goswell*, 9 C. B. N. S. 706: *Hewitt v. Pigott*, 7 Bing. 400: 1 Dowl. 219: *Wood v. Morewood*, 2 Sc. N. R. 204: 3 *ibid.* 197: and see *Benyon v. Godden, ante*. See as to production of exhibits *ante*, Section VII.

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IX. *As to the Mode of making Applications relating to Discovery and the Persons having Jurisdiction to hear them.*

All applications for or in relation to discovery or enforcing discovery or inflicting penalties for default in giving discovery under Ord. XXXI. (except for attachment which must be made by motion) should be made by summons: if made by motion, the additional costs so occasioned will be ordered to be paid by the applicant unless there is some special reason for so making it: see for instance *Hennessey v. Bohmann*, cited *ante*, p. 581. In reference to a motion to dismiss for want of

prosecution under Ord. XXXVI. r. 12, Jessel, M. R. observed that the rule authorised an application to the court or a judge because in the common law division it was not always possible to get a judge in chambers, but that in the chancery division it was best generally to make the application in chambers although it was not obligatory: *Freason v. Loe*, 26 W. R. 138. See also Ord. LV. as to the business in chambers in the chancery division.

Note the omission of "therein" after "pendency" in the present rule (see App. Ch. II.): see *Danvillier v. Myers*, *post*.

A master in the Queen's Bench Division, and registrar in the Probate, Divorce and Admiralty Division, has jurisdiction to make orders for and in relation to discovery and for enforcing discovery and for inflicting penalties for default in giving discovery under Ord. XXXI.

A master or registrar has no power to order inspection of property under Ord. L. r. 3: see Ord. LIV. r. 12.

A district registrar has the same jurisdiction as a master: see Ord. XXXV. r. 6: see for instance *Gibson v. Sykes*, 28 S. J. 533, referred to *ante*, p. 590. See as to a district prothonotary of the Court of Common Pleas at Lancaster before the Jud. Act, *Coster v. Blackburn*, L. R. 8 Q. B. 54.

See as to the powers of a chief clerk in proceedings before him *ante*, Ch. IV.

An official referee has, subject to any order to be made by the court or judge ordering the same, the same authority with respect to discovery and production of documents as a judge of the High Court: see Ord. XXXVI. r. 50. Under the old rules he had no such power, and it was necessary therefore to apply in the chambers of the judge to whom (see *ante*) the action belonged: *Danvillier v. Myers*, 17 Ch. D. 346, where the official referee to whom the action had been referred had ultra vires made an order for an inspection of certain documents: and see *Roucliffe v. Leigh*, 4 Ch. D. 661, where a claim carried in under an administration decree had been referred, and Hall, V. C. refused to decide whether the official referee had power, and made the order for a further



affidavit himself. *Danvillier v. Myers* was ultimately dismissed for default in giving discovery : see *ante*, p. 588.

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X. *As to Reading the Answer against other Persons.*

The answer of one defendant cannot\* be read as an admission or used as evidence against a co-defendant : *Redes*. Pl. 223 : and see *ante*, pp. 53, 83, discussing the question of reading the answer of a bankrupt against his assignees, and of the person giving discovery on behalf of a corporate body against the body : and *Heatley v. Newton*, cited *ante*, p. 47. The reason why it cannot be used in evidence against a co-defendant is because he has no opportunity of cross-examining to it : see note to *Wych v. Meal*, 3 P. W. 310 : and *Morse v. Royal*, 12 Ves. p. 361 (trustee and cestui que trust).

Where a defendant admitted a document but referred to it for greater certainty or craved leave to refer to it, the document must be produced if the plaintiff wished to read it : *Cox v. Allingham*, Jac. p. 339 : *Lett v. Morris*, 4 Sim. p. 611.

An office copy of interrogatories left at the office of the solicitor of the interrogated party was held to be delivery within section 12 of the Ch. P. Act, personal service on the solicitor not being necessary : *Bowen v. Price*, 2 D. G. M. & G. 899.

Qu. whether discovery would be ordered for the purpose of interlocutory applications, as for instance an injunction : see *Cliff v. Bull*, 17 W. R. 1120 : where production was ordered

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\* It was said in *Gibbons v. Waterloo Bridge Co.* 1 C. P. Coop. 385, that the cases in which it could be done were very few : but the only exceptions were cases such as *Cross v. Beddingfield*, 12 Sim. 35, where the admission of an obligor was used against his co-obligor ; or such as *Anon.* 1 P. W. 301, where a defendant referred to his co-defendant's answer and in effect adopted it. The old practice of hearing the suit on bill and answer, or motion for decree need not be here considered.

for the purpose of cross-examining a plaintiff on his affidavit, after notice to produce in the usual form had been given, and he had refused to produce certain documents.

The effect of consenting to judgment is a waiver of the plaintiff's right to an answer to interrogatories previously delivered: *Bridgewater v. Bridgewater*, 22 S. J. 662; and it was so held at common law before the Jud. Act: *Hayne v. Pratt*, L. R. 6 C. P. 105, where judgment by consent had been signed in an action of detinue, and where the sheriff was unable to discover the articles, one of the interrogatories asking where the articles were.

## CHAPTER X.

## ACTIONS FOR DISCOVERY.

THE necessity of an action for discovery under the present procedure must be of rare occurrence (see *Ramsden v. Brearley*, cited *ante*, p. 10, as to bills of discovery under 6 & 7 Will. 4, c. 76, s. 13). There are only three reported cases since the Jud. Act.: *Orr v. Diaper*, 4 Ch. D. 92 (cited *ante*, p. 40), where the action was instituted to discover the names of certain persons (consignees) for the purpose of bringing an action against them: *Reiner v. Salisbury*, 2 Ch. D. 378, where the action was brought in aid of proceedings to recover land in India, and was held demurrable on the ground that the proceedings could not be taken in England, and if taken in India, the courts in India could compel discovery: and *Ainsworth v. Starkie*, W. N. 76, p. 8 (in aid of an arbitration as to which see *ante*, p. 574). See also *Brown v. Wales*, a bill of discovery against overholding tenants to discover the parcels and boundaries of the demised property, cited *ante*, p. 279.

Every bill was in reality a bill of discovery: but the species of bill usually distinguished by that title was a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery (or at all, see *post*), though it might pray the stay of proceedings at law till the discovery should be made: Redes. Pl. 63, 34: Coop. Eq. Pl. 58: Madd. Ch. P. 267: *Ellice v. Roupell*, 32 Beav. pp. 311—315.\*

A bill which specifically prayed discovery but also prayed for relief (even general relief: *Angell v. Westcombe*, 6 Sim. 30: *Allan v. Copeland*, 8 Pri. 522:

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\* See *ante*, p. 271, as to the distinction between the cases where inspection or a disclosure of the contents of a document is sought as a function of discovery, and where it is sought by way of relief.

disapproving *Brandon v. Sands*, 2 Ves. jun. 514, contra: or that the defendant might abide such order and decree, &c.: *Ambury v. Jones*, 1 Y. 199: *James v. Herriott*, 6 Sim. 428: but not where the word "order" was used, for that meant such an order as was consistent with the general scope of the bill as a bill of discovery: *Baker v. Bramah*, 7 Sim. 17: and see *S. E. R. Co. v. Submarine Telegraph Co.* 18 Beav. 429: nor an injunction to stay the proceedings in aid of which the discovery was required: *Allan v. Copeland*, and see *post*, p. 617: nor for deposit of documents in the hands of the clerk in court for the purpose of inspection: *Crow v. Tyrell*, 2 Madd. p. 408: but otherwise where delivery was prayed: *Aston v. Exeter*, 6 Ves. p. 290: nor for a commission to examine witnesses: *Mills v. Campbell*, 2 Y. & C. 389: *Allan v. Copeland*: *Angell v. Angell*, 1 S. & S. 83: *Stewart v. Nugent*, 1 Keen, 201: *Noble v. Garland*, 19 Ves. 376: nor to perpetuate testimony; see Dan. Ch. Pr. 469, citing *Rose v. Gannel*, 3 Atk. 439: *Hall v. Hoddesdon*, 2 P. W. 162: *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316: see also *Ellice v. Roupell*, 32 Beav. pp. 311—317) could not be a bill of discovery: *Ambury v. Jones*: *Rose v. Gannel*, *ante*, and 1 Sch. & Lef. 316; *Angell v. Westcombe*. Where therefore a bill which was clearly intended to be a bill of discovery only, prayed relief of any kind, it was demurrable: *Ambury v. Jones*: but liberty would be given to amend by striking out a prayer for general relief: *Angell v. Westcombe*. In every case it ought to appear whether the bill was for relief or discovery only, for if that was left in doubt the defendant might put in an answer, and then the plaintiff might amend his bill by praying specific relief: *Angell v. Westcombe* (and see old rule, Ord. XIX. r. 8, "if the plaintiff's claim be for discovery only the statement of claim shall show it:" but the present rule, Ord. XX. r. 6, does not contain this provision). In a suit for relief discovery could not be obtained independently of the relief: the discovery could only be in aid of the proof of his claim in the suit: if he showed no title to raise that claim, it followed that he had no title to the discovery: see for instance *ante*, p. 55, and *Wood v. Hitchens*, 3 Beav. 504, p. 509, and *Desborough v. Curlewis*, 3 Y. & C. 175: in early times it was otherwise: a plaintiff though his title to relief failed would sometimes be allowed to have discovery, the bill being then considered as in effect a bill for discovery merely: Redes. Pl. 111, 184: Beames Eq. Pl. 250.

The court would not allow a bill of discovery to be turned into a bill for relief: *Butterworth v. Bailey*, 15 Ves. 358 (Lord Eldon there giving reasons): *Jackson v. Strong*, M'Clell. 245: 13 Pri. 494: whether before or after answer: *Parker v. Ford*, 1 Coll. 506: though in some cases it seems to have been done, but qu. whether not by consent: *Hildyard v. Creasy*, 3 Atk. 303: *Crow v. Tyrell*, 2 Madd. 397: *Louisada v. Templer*, 2 Russ. 561 (the defendant to be at liberty to put in a fresh answer as if no answer had been put in to the discovery): *Severn v. Fletcher*, 5 Sim. 457 (before answer to a cross bill of discovery and after hearing of the original bill): and see Redes. Pl. 201, where the practice seems to have been considered legitimate: nor after answer to amend by striking out the prayer for relief: *Cholmondeley v. Clifton*, 2 V. & B. 113: 2 Mer. 71.

A bill of discovery must have stated matters sufficient to satisfy the conditions on which a court of equity would entertain a bill of discovery: these conditions are discussed on the following pages. (See *Ingilby v. Shafto*, 33 Beav. 31, and the cases of *Orr v. Diaper*, 4 Ch. D. 92, and *Reiner v. Salisbury*, 2 Ch. D. 378, since the Jud. Act, for the form of an action for discovery.) Where the bill was filed by a defendant it would pray the stay of the proceedings in

question. It was not brought to a hearing: on a full answer being given no further proceedings could be taken thereon: Redes. Pl. 16; and the defendant was entitled to an order for payment of his taxed costs. Nor could it be dismissed for want of prosecution, but the defendant should apply for payment of his costs: *Woodcock v. King*, 1 Atk. 286: *S. E. R. Co. v. Submarine Telegraph Co.* 18 Beav. 429. Where production of documents was required, they were ordered to be deposited in court with liberty to use them in evidence at the trial. (See *Aston v. Exeter* and *Hylton v. Morgan*, 6 Ves. 288, 293, where Lord Eldon distinguishes between ordering production at the trial of an action at law on a bill for discovery, and one for relief.) They could not be produced apart from the answer, being in fact a part of it: see *Brown v. Thornton*, 1 M. & C. p. 248: and it was only on that footing that they could be used: no order for their production at the trial would therefore be made, for otherwise the party would have the power of using them apart from the answer: *ibid.*: *ante*, p. 602: and see observations of Lord Eldon in *Princess of Wales v. Liverpool*, *ante*, p. 248, as to the difference in this respect between ordering production at common law and getting production by bill of discovery. See also *ante*, p. 601, as to reading the whole of an answer to a bill of discovery, and the bill itself.

A bill of discovery must be filed in aid of some proceedings either pending or intended, and there must be allegations to that effect: a court of equity did not compel discovery for the mere gratification of curiosity: *Cardale v. Watkins*, 5 Madd. 18. In a bill for discovery it was necessary for the plaintiff to show by his bill a case in which a court of equity would assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction was exercised to assist the administration of justice in the prosecution or defence of some other suit either in the court itself or in some other court: Redes. Pl. 186. The discovery must be material to some suit instituted or capable of being instituted: Redes. Pl. 191, 192: and see *Reiner v. Salisbury*, 2 Ch. D. 378, where an action for discovery was successfully

demurred to on the ground that the suit in question would not lie in England: see also *Ellice v. Roupell*, 32 Beav. pp. 311—315.

A party might file a bill of discovery before he commenced his action, where he required discovery in order to ascertain what form of action to bring: *Bent v. Young*, 9 Sim. p. 184: and see *Angell v. Angell*, 1 S. & S. 83: or in order to ascertain the proper person against whom to bring the action: *Moodalay v. Morton*, 1 B. C. C. 468: 2 Dick. 652 (against a company and a secretary to ascertain whether the persons who had done the act complained of were acting by the company's authority): *Angell v. Angell*, 1 S. & S. 83: *Mendes v. Barnard*, 1 Dick. 65: *Orr v. Diaper*, 4 Ch. D. 92, cited *ante*, p. 40: and see *ante*, p. 330, as to bills of discovery to discover the names of printers, publishers or proprietors of newspapers under 6 & 7 Will. 4, c. 76, s. 19, and in particular *Dixon v. Enoch*, L. R. 13 Eq. pp. 399—400, there cited: see also *Mayor of London v. Levy*, cited *post*, p. 614.

It seems that a party against whom no proceedings had commenced but who had been threatened with proceedings could file a bill of discovery: see *Darthee v. Lee*, 2 Y. & C. pp. 13—14: *Wilmot v. Maccabe*, 4 Sim. 263: and Redes. Pl. 192.

A defendant to an action at law might join as co-plaintiff with himself in a bill of discovery a person who had an equal interest with him though not a defendant to the action, for instance a partner: *Darthee v. Lee*, *ante*.

A bill of discovery might be brought against an executor for discovery of personal estate before will proved or pendente lite in the spiritual court: *Dulwich Coll. v. Johnson*, 2 Vern. 48.

Where the plaintiff in a bill showed only the probability of a future title upon an event which might never happen he had no right to institute any suit concerning it: and a demurrer would hold to any kind of bill on that ground which would extend to any discovery as well as to relief: for instance an heir at law could not during his ancestor's life maintain a bill for discovery of facts or deeds material to the ancestor's estate: Story, Eq. Jur. § 1490.

If the plaintiff showed a complete title, though a litigated one, or one that might be litigated (as that of an administrator, citing *Wright v. Bluck*, 1 Vern. 106, bill by administrator to discover personal estate, a plea that plaintiff had wrongly obtained administration being overruled) a demurrer would not of necessity hold to discovery: see Redes. Pl. 157.

It was not necessary in order to support a bill of discovery that the plaintiff was destitute of other proof of his case: his right to have discovery by bill for that purpose was on a par with his right to have discovery in a suit for relief in equity: see *ante*, pp. 1—2.

The courts in aid of proceedings in which a bill of discovery would be entertained by a court of equity.

A bill of discovery would be entertained in aid of the prosecution of or defence to any civil (see *ante*, p. 3) proceedings in any court of not inferior dignity and not having itself power to compel a discovery: see Redes. Pl. 186: *Derby v. Athol*, 1 Ves. p. 205: *Bent v. Young*, 9 Sim. p. 191: and other cases *post*.

In early times the Court of Chancery would not interfere to grant discovery where the court in which were the proceedings in question could itself compel a discovery: Redes. Pl. 186: and see the cases *post*. But after the passing of the C. L. P. Acts conferring on the common law courts powers of discovery, see *ante*, p. 5, the Court of Chancery would still entertain bills of discovery in aid of actions in those courts: see for instance *Ingilby v. Shafto*, 33 Beav. 31: see also *Fuller v. Ingram* and *Peacocke v. Lowe*, *ante*, p. 561.

A bill of discovery would not be entertained in aid of proceedings in the Ecclesiastical Court, for that court could itself compel discovery: *Anon.* 2 Ves. 451: *Dunn v. Coates*, 1 Atk. 288: Redes. Pl. 186: *Derby v. Athol*, 1 Ves. p. 205. But see as to the Probate Court, *Fuller v. Ingram*, *ante*, p. 561.

A bill of discovery would be entertained in aid of the jurisdiction of the king in council, for discovery could not be entertained there, nor was it below the being aided by the Court in Chancery: *Derby v. Athol*, p. 205. See as to a bill of discovery for the purpose of an appeal to the Privy Council, *Wood v. Hitchins*, cited *ante*, p. 605.

An action for discovery would not be entertained in aid of a suit in India, for the courts there are armed with legal and equitable jurisdiction with regard to discovery: *Reiner v. Salisbury*, 2 Ch. D. p. 386.

But that the court in aid of which the bill was filed had power to order production of documents was no reason for refusing discovery: for no discovery could be had under such a power, for instance of documents which had been in the party's possession, and which he had destroyed, and of their contents: *Morris v. Norfolk*, 9 Sim. 472.

The Court of Chancery would not entertain a bill of discovery in aid of an inferior court\*: *Derby v. Athol*, 1 Ves. p. 205: therefore, *semble*, not in aid of the prosecution of or defence to proceedings in a foreign court, for every foreign court was in the contemplation of the Court of Chancery an inferior court: *Bent v. Young*, 9 Sim. 180, pp. 191, 192: commenting on *Crowe v. Del*

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\* It would assist the judgment of an inferior Court of Equity: Redes. Pl. 96: Beames, Eq. Pl. 66: also the judgment of an Ecclesiastical Court giving civil rights: *ibid.*: Redes. Pl. 127.



*Rio* cited in *Redes*. Pl. 53, 186 : and also in this particular case on the ground that it did not appear that discovery could not be obtained in the foreign court.

A bill of discovery would lie in aid of an issue to try a disputed right under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71 : *Morris v. Norfolk*, *ante*.

See as to a bill of discovery in aid of an arbitration, *ante*, p. 574.

See an instance of a bill of discovery in aid of the Lord Mayor's Court, *Mayor of London v. Byfield*, 1 Ch. Ca. 203. But see as to discovery in that court, *post*, p. 623.

Where a court had directed an issue a bill of discovery could only be filed by the leave of that court : see *Hare*, p. 124 : *Cooke v. Marsh*, 18 Ves. 209 : *Morris v. Norfolk*, p. 482.

As to the persons against whom a bill of discovery may be filed.

Where the proceedings in aid of which discovery is required are already commenced a bill of discovery can only be filed against a party to those proceedings : see *ante*, p. 40 n.

Where the proceedings are not yet commenced, a bill of discovery can generally only be filed against a person whom it is intended to make a party to those proceedings : but there are exceptional cases in which a person may be made defendant to a bill of discovery who will not necessarily be a party to the proceedings : see *Orr v. Diaper* and other cases *ante*, p. 40, n. 612. The language in which Lord Eldon in *Mayor of London v. Levy*, 8 Ves. p. 404, states the rule requires perhaps some little qualification. "That where the bill avers that an action is brought or where the necessary effect in law of the case stated by the bill appears to be that the plaintiff has a right to bring an action he has a right to a discovery to aid that action so alleged to be brought or which he appears to have a right and an intention to bring cannot be disputed. But it has never been nor can it be laid down that you can file a bill not venturing to state who are the persons against whom the action is to be brought : nor stating such circumstances as may enable the court which must be taken to know the law and therefore the liabilities of the defendants to judge, but stating circumstances : and averring that you have a right to an action against the defendants or some of them. That of necessity admits that some of the defendants may be only witnesses ; and against them there is no right to file such a bill." So at p. 402 : "unless the act as to which you want the discovery was done by that person, he may be a witness at the trial, but cannot be a defendant to a bill of discovery : " and at p. 404 : "you have no right to a discovery except against the person against whom you aver that you mean to bring the action."

The objections\* which could be raised by a defendant to a bill of discovery fall under two distinct heads : (a) that the

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\* The following are the grounds of demurrer to discovery alone (whether in a bill for discovery or for relief) as stated by Lord Redesdale in *Redes*. Pl. 185 :—(1) that the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery : (2) that the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery : (3) that the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery : (4) although both plaintiff and defendant may have an interest in the subject yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill : (5) that the discovery if obtained cannot be material : (6) that the situation

particular discovery which was required was objectionable, (b) that there was no right to require any discovery at all. The objections which can be raised to the particular discovery required are the same as in the case where the discovery is sought in the same cause or matter as the relief. The objections to the right to require any discovery at all may be classed as follows:—

(1) That the court in aid of the proceedings in which the discovery is sought is not a court which a court of equity would assist:

(2) That the person from whom the discovery is sought is not or will not be a party to the proceedings in aid of which the discovery is sought, or, where the proceedings are not yet commenced, is not within the exceptions to this rule:

(3) That the party seeking discovery is under some personal disability:

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of the defendant renders it improper for a court of equity to compel a discovery. To these must be added, two of the grounds of demurrer to relief as being applicable also to discovery, that the plaintiff is not entitled to sue by reason of some personal disability (*ibid.* 110, 153—154), multifariousness, that is, discovery of several distinct matters against several distinct defendants (*ibid.* 110, 200). The above grounds 1. 2. 3. (and 4: *ibid.* 234) and 6 were also raisable in a proper case by plea: *ibid.* 282: so also the above grounds of personal disability: *ibid.* 226—230: and multifariousness: *ibid.* 221.

The sixth ground of demurrer and plea, including, see *Redes*. Pl. 194—200, and 284—288, such grounds as discovery exposing to penalties or punishments, involving a breach of professional confidence, from a purchaser for valuable consideration, are grounds referable to the particular discovery required: so also the fifth and fourth grounds of demurrer: see this statement of the fourth ground commented on *ante*, p. 445.

In *Cooper*, Eq. Pl. p. 189, twelve grounds of demurrer to discovery are stated: (1) that the subject is not cognizable in any municipal court of justice: (2) that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted: (3) that the plaintiff is not entitled to the discovery by reason of some personal disability: (4) that the plaintiff has no title to the character in which he sues: (5) that the value of the suit is beneath the dignity of the court: (6) that the plaintiff has no interest in the subject-matter, or title to the discovery required, or that an action will not lie for which it is wanted: (7) that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery: (8) that the policy of the law in regard to the relation in which the defendant stands exempts the defendant from being called on for the discovery: (9) that the defendant is not bound to show his title: (10) that the discovery if obtained does not appear to be material: (11) that the defendant is a mere witness: (12) that the defendant cannot be called on to criminate himself.

(4) That the party seeking discovery has not that character or interest which he alleges himself to have :

(5) That the proceedings or the defence thereto in aid of which the discovery is sought are or is not maintainable :

(6) Multifariousness.

As to (1) see *ante*, p. 613.

As to (2) see *ante*, p. 614.

(3)

The defendant may show that the plaintiff is disentitled to sue by reason of some personal disability, as an infant, married woman, idiot, lunatic (alien enemy : *Daubigny v. Davallon*, 2 Anstr. 462, p. 467, where it was held that he was equally incapable of filing a bill for discovery as for relief : but not where he was sued at law and the bill was in aid of his defence : *Albrecht v. Sussmann*, 2 V. & B. 323), &c. : see Redes. Pl. 153 (demurrer) : and Redes. Pl. 226 (plea).

A reason is that the defendant to a bill for discovery being always entitled to costs after a full answer would be materially injured by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs : Redes. Pl. 153.

(4)

The defendant may show that the plaintiff has not the interest or character which he alleges himself to have : *Mendizabel v. Machado*, 1 Sim. 68, p. 78 : *Gait v. Osbaldiston*, 1 Russ. 158, reversing *ibid.* 5 Madd. 428 : Redes. Pl. 230—231, 283 : otherwise a person would be at the mercy of anyone who choose to file a bill of discovery against him on a false allegation : see *ibid.*

If a plaintiff filed a bill as heir or administrator for discovery from a person in possession of property belonging to the deceased, or of his title thereto, or of the particulars of which it consisted, the defendant might plead that another person was heir or personal representative, or that the alleged deceased was living : Redes. Pl. 283.

(5)

Where the action at law (or the defence to it : Story, Eq. Jur. § 1493 a : *Macaulay v. Shakell*, 1 Bl. pp. 114, 120) was clearly not maintainable, a demurrer, or in a proper case a plea, would hold : see Redes. Pl. 187 : *Northleigh v. Luscombe*, Ambl. 612 : *Rondeau v. Wyatt*, 3 B. C. C. 153, and *Debigge v. Howe* there cited : *Ramere v. Rawlins*, and *Newman v. Holder*, Finch, 36, 44 (bills for discovery of a will and probate stating no title in the plaintiff) : *Wallis v. Portland*, 3 Ves. 494, p. 500 : *Kensington v. Mansell*, 13 Ves. 240 : *Crcu v. Tyrrell*, 2 Madd. p. 408 : Story, Eq. Jur. § 1493 a. If however there was any question whether or not the action at law was maintainable the courts of equity were disinclined to take it on themselves to decide the legal point : what might therefore be a good legal bar to the action was not necessarily a good bar to the bill of discovery : where the question as to the validity of the bar at law was at all an open one, the discovery would be enforced : see *Hindman v. Taylor*, 2 B. C. C. 7 : *Rondeau v. Wyatt*, 3 B. C. C. 153 : *Thomas v. Tyler*, 3 Y. & C. 255 : *Robertson v. Lubbock*, 4 Sim. 161 : *Leigh v. Leigh*, 1 Sim. p. 367 : *Scott v. Bracadwood*, 2 Coll. 447, p. 456 : Beames, Eq. Pl. 276—277 : Story, Eq. Jur. § 1493 a : and see as to the validity of a demurrer or plea founded on the Statute of Limitations, *Dean of Westminster v. Cross*, Bunb. 60 : *Baillie v. Sibbald*, 15 Ves, 185 (arg.) : *Jerney v. Best*, 1 Sim. 373 : *Macgregor v. E. I. Co.* 2 Sim.

452 (allowing it if pleaded to the declaration at law): *Crow v. Tyrrell*, 2 Madd. p. 408 (where it would have been allowed if the plea had been in proper form): *Scott v. Broadwood* (allowing it). However in *Smith v. Fox*, 6 Ha. 386, p. 391, Wigram, V. C. laid it down in express terms that a court of equity would in such a case determine for itself the legal question. "Whatever question might at one time have existed upon the point it is now clear that the defence that the Statute of Limitations is a bar to the suit may be raised by demurrer. There is no doubt but that is so where relief is sought in equity: and I apprehend that it is the same where discovery only is sought in aid of relief at law. It is immaterial with a view to this question whether the relief be in equity or at law; the point to be determined on the demurrer in both cases is simply whether the plaintiff is entitled to an answer or not. So also, whatever question there might be one time have been upon the reasoning of Lord Thurlow in *Hindman v. Taylor* as to the point raised as to the defence in equity being the very point to be tried by the action it is now settled that a party applying to this court for discovery in aid of an action in which the defendant may by plea or demurrer show that the plaintiff is not entitled to recover may raise the defence by plea or demurrer in equity. The justice of the case requires that the defence to the discovery should be open to the defendant in equity." See also Mr. Hare's note to this case commenting on *Hindman v. Taylor*: and *Reiner v. Salisbury*, 2 Ch. D. p. 384.

Where the question whether or not the action or the defence to it was maintainable depended on an issue of fact in aid of which the discovery was sought, the court of equity would not decide that issue; for if it did, it would reduce the plaintiff to the necessity of proving in that court without a discovery that he had a right to support the action or the defence to it: see *Robertson v. Lubbock*, 4 Sim. 161: and see *ante*, p. 19, as to an action for relief.

# (6)

It should seem that a demurrer would hold to a bill for discovery of several distinct matters against several distinct defendants. For though a defendant is always eventually paid his costs upon a bill of discovery if both parties live, and the plaintiff by amendment of his bill does not extend it to pray relief, yet the court ought not to permit the defendant to be put to any unnecessary expense, as either the plaintiff or defendant may die pending the suit: *Redes. Pl. 201*.

Want of parties was no objection to a bill of discovery: *Redes. Pl. 200, 281*: and see *Darthee v. Lee*, *ante*, p. 612: and *Cholmondeley v. Clifton*, 2 Mer. p. 74, where an application to amend by adding plaintiffs was refused.

As to injunctions staying the prosecution of the action in aid of the defence to which the discovery is required.

Up to 15 & 16 Vict. c. 86, s. 58, the practice was to issue an injunction as a matter of course (called the common injunction) on the defendant to the bill making default in appearing or answering within the proper time, the defendant being entitled to move for its dissolution on putting in a sufficient answer: but until such default no injunction would be issued.

By this act this practice was put an end to: and the court would grant an injunction at any time (after interrogatories filed: *Chilton v. Campbell*, 20 Beav. 531: *Fuller v. Ingram*, 5 Jur. N. S. 510: *Lloyd v. Adams*, 4 K. & J. 467: but qu. whether this was necessary where the defendant had not appeared: *Fitzgerald v. Bull*, 9 Ha. App. 65) on an affidavit by the plaintiff

verifying his case as a *bonâ fide* one and showing that the discovery might assist him in wholly or partially destroying the case at law against him and was therefore material to his defence; and if such a *primâ facie* case was so made out, the court would issue the injunction and would not regard the defendant's affidavits in opposition: *Senior v. Pritchard*, 16 Beav. 473, p. 476: *Lovell v. Galloway*, 17 Beav. 1: 19 Beav. 642: *Magnay v. Mines Royal Co.* 3 Drew. 130, pp. 133—134: *Fox v. Smith*, 2 D. G. & J. 353; *Mollett v. Enequist*, 25 Beav. 609: *Harris v. Collett*, 26 Beav. 222: *Garle v. Robinson*, 3 Jur. N. S. 633: and therefore the defendant would not be allowed his costs of filing affidavits in opposition to the injunction, the ordinary practice being to make the costs of the application costs in the cause and therefore payable by the plaintiff: *Lovell v. Galloway*, 19 Beav. 642: and see *post*.

On putting in an answer which had been found to be or had by lapse of time become sufficient (not therefore pending a motion for production of documents in the answer: *Storer v. Jackson*, 12 Sim. 503) the defendant was entitled to have the injunction dissolved (originally by order nisi in the first instance in order to give the plaintiff the opportunity of excepting): *Gibson v. Chayters*, 8 Beav. 167: *Stanley v. Bond*, 5 Beav. 175: *Mollett v. Enequist*, 26 Beav. 466: *Magnay v. Mines Royal Co.* p. 133.

Where there were two or more defendants, the injunction would not as a rule be dissolved until all had answered: see *White v. Steinwacks*, 19 Ves. 83: *Joseph v. Doubleday*, 1 V. & B. 497: *Nanney v. Vaughan*, 8 Sim. 439: *Naylor v. Middleton*, 2 Mad. 131. But where officers of a company were made co-defendants with the company to a bill of discovery, the injunction was dissolved on the company's answer being put in, though the officers had not answered: *Glascott v. Copper Miners' Co.* 11 Sim. 314: and see *ante*, p. 76.

### The costs of a bill of discovery.

The costs of every bill of discovery were originally payable by the plaintiff as a matter of course (the suggestion in *Weymouth v. Boyer*, 1 Ves. jun. p. 423, that where a defendant before suit improperly refused to give discovery, as for instance accounts, he should pay the costs was never acted on): *Redes. Pl. 201*: *Dan. Ch. Pr. 1411*. But later by *Consol. Ord. XL. r. 14* (varying a similar order of 1841: see *Westfield v. Skipwith*, 1 Ph. 277, under this order) it was provided that the costs of a bill of discovery filed by any defendant to a bill for relief (that is to say a cross bill in aid of his defence thereto: *Heming v. Dingwall*, 2 Ph. 212) should be costs in the original cause unless the court should otherwise direct: and wherever the cross bill was *bonâ fide*, the costs would be costs in the original cause, though it did not turn out necessary for the defendant to avail himself of the whole of the discovery: *Robinson v. Wall*, 10 Beav. 73: and see *Watts v. Penny*, 17 Sim. 45; 11 Beav. 435.

After answer (that is to say a sufficient answer so held or become so by lapse of time) the defendant might get an order of course for taxation and payment of his costs: *Redes. Pl. 201*: *Woodcock v. King*, 1 Atk. 286: *Coventry v. Bentley*, 3 Mer. 677: *Dan. Ch. Pr. 1411*: unless the plaintiff should get an order to amend for fuller discovery: *Redes. Pl. 201*. Where an order had been obtained for a commission to examine witnesses, the order could not be got till after the commission had returned: *Anon.* 8 Ves. 69: *Bunbury v. —*, 9 Ves. 103.

The costs so payable by the plaintiff included the costs of all applications as of motions for injunction (but see *Lovell v. Galloway*, *ante*), for commission to examine witnesses, for production of documents: *Noble v. Garland*, 1 Madd. 344: but not necessarily the costs of successful exceptions: see *Hughes v. Clerk*, 6 Ha. 195: *Thomas v. Rawlins*, 27 Beav. 375.

As to amending actions of discovery and supplemental actions.

A supplemental bill of discovery would be allowed if required for the pur-

pose of doing justice: *Few v. Guppy*, 1 M. & C. pp. 507—508. So a bill of discovery could be amended: see *Redes*. Pl. 201.

The penalties or remedies for default in giving discovery in the case of actions for discovery.

The penalties prescribed by Ord. XXXI. r. 21 (see *ante*, Ch. VII.) for default in giving discovery in an action for relief are attachment, and striking out the claim or defence as the case may be. In the case of an action for discovery, the second of these penalties is inapplicable. But qu. whether the old chancery practice of taking the bill pro confesso, which was really analogous to the present practice of striking out the defence, might not be held to have survived for this purpose. The effect of an order to take a bill of discovery pro confesso was that the bill might be taken and read in any court of law or equity as evidence of the same facts and on behalf of the same parties as could an answer admitting the contents of the bill: 1 Will. 4, c. 36, s. 15: *Dan. Ch. Pr.* pp. 421, 1412. If this be so, it might be desirable to state in the claim every matter and fact on which discovery is wanted in order by this practice to get admissions of them. But it is obvious that in some cases this remedy would be insufficient, and that the process of attachment (or sequestration, see *ante*, p. 584) would have to be resorted to, in order to compel the discovery.

## CHAPTER XI.

## DISCOVERY IN THE COUNTY COURTS AND IN THE LORD MAYOR'S COURT.

I. *Discovery in the County Courts.*

The practice of discovery in the county courts is regulated by the Consolidated County Court Orders and Rules of 1875, and sections 50—54 of the C. L. P. Act, 1854 (see *post*, Appendix, Chapter II.), which were extended to the county courts by Order in Council of November, 1867; and although these sections have now been repealed by 46 & 47 Vict. c. 49, they are by sections 5 and 7 preserved so far as the county courts are concerned.

The following are the Rules of 1875 dealing with discovery:—

## ORDER XIII.

Rule 1. Where in any action any party desires the production of any document or documents relating to the matter in question in such action, he shall make an affidavit that he has reason to believe that such document or documents is or are in the possession or power of one of the parties, and the registrar shall, upon the delivery to him of the affidavit and a copy thereof, file the affidavit and make an order (annexing thereto the copy of the affidavit), that the party against whom such application is made shall answer on affidavit stating what documents he has in his possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he objects, and if so, on what grounds, to the production of such of the documents as are in his possession or power; and the time within which the opposite party shall return such affidavit to the court shall be stated in the order, which order shall be served by the bailiff of the court, or a solicitor, or by post.

Rule 2. The party against whom such order is made shall answer on affidavit according to the terms of the order, and send the affidavit and a copy thereof to the registrar, by post or otherwise, within the time stated in the order; and the registrar shall, immediately upon receiving such affidavit, file the same, and transmit by post, or otherwise, to the party making the application the copy of the affidavit.

Rule 3. Where after such last-mentioned affidavit is filed the party making the application requires a further order thereon, he shall apply to the registrar for such further order; and if there be no matter of fact or law in dispute between the parties, the registrar shall make an order in writing, in accordance with the facts; but if there shall be any matter of fact or law in dispute between the parties, the registrar shall transmit both affidavits to the judge, who shall direct the registrar to give notice, by post or otherwise, to



both parties of a time and place when and where he will hear the application, and make such order thereon as shall be just.

Rule 4. An order for the production of any deed or document shall state the time when and the person to whom the same shall be produced, and it may further order that the same may be deposited with the registrar, to be produced at any trial or hearing, or that the registrar may make a copy thereof for any party.

Rule 5. Where in any action any party is desirous of inspecting any written or printed document or instrument which he is entitled to inspect relating to the matter in question in such action, and which shall be in the possession or power or under the control of the other party, such first-mentioned party may, five clear days before the day of hearing, give notice to the other party, by post or otherwise, that he, or his solicitor, desires to inspect any such document or instrument, describing the same, at any place to be appointed by the other party; and if such other party shall neglect or refuse to appoint such place, or to allow such plaintiff or defendant, or his solicitor, to inspect such document or instrument, within three clear days after receiving such notice, the judge may in his discretion, on the day of trial, adjourn the action and make such order as to costs as he shall think fit.

Rule 6. Where a party desires to interrogate any party, he shall apply to the registrar for leave to deliver interrogatories, and upon making such application he shall file an affidavit, made by himself only, or by himself and his solicitor or agent, if any, or, by leave of the registrar, by his solicitor or agent only, stating that the deponent believes that the party proposing to interrogate will derive material benefit in the action from the discovery which he seeks, and that there is a good cause of action or defence upon the merits. And upon such application the registrar shall make an order, according to the form in the schedule, that the applicant may, within a time to be named in such order, deliver to the party to be interrogated interrogatories in writing upon any matter as to which the applicant seeks discovery, and shall in such order require the party interrogated to answer the questions in writing by affidavit, and file such answers within such time, to be appointed by the registrar, as shall enable the party making the application to use the answers so returned as evidence at the trial.

Rule 7. Where a party served with the order shall object to answer the interrogatories, he shall file an affidavit stating his grounds for objecting, and that he will be prepared to show cause to the court at the return day against his being required to answer them; but where it is only some of the interrogatories he objects to answer, he may include in his affidavit both his replies and his objections.

Rule 8. Where the party required to answer interrogatories shall successfully show cause against an order requiring him to answer them, the judge may direct the action to proceed, or to be adjourned if he thinks fit, and upon terms as to costs; but if the party objecting shall not show sufficient cause for his objection, the judge may order the interrogatories to be then and there answered *vivâ voce* in court, or may adjourn the action, and make an order for the answering of the interrogatories by such time, and for the payment of such costs as may have been incurred through the delay, as he may think fit.

The following are the bodies of the forms given in the schedule to the County Court Rules of 1875:—

#### 54.—AFFIDAVIT FOR DISCOVERY.

I, A. B. the above-named plaintiff [or defendant] make oath and say as follows: [*here set out in paragraphs the documents, and that the deponent is advised and believes that it is material and necessary for him, in order to support his claim upon the trial, to have such documents produced to him, and that he will derive material advantage and support from their production, and that he is advised and believes that he is entitled to their production, and that he believes that the said documents are in the possession or power of the defendant*].

## 55.—ORDER FOR DISCOVERY.

Upon reading an affidavit by the plaintiff [or defendant] a copy of which is annexed marked A, I do order that the plaintiff [or defendant] do within \_\_\_\_\_ days answer on affidavit, stating what documents he has in his possession or power relating to the matters in dispute in this cause, and what he knows as to the custody they or any or either of them are in, and whether he objects, and if so, on what grounds, to the production of such as are in his possession or power.

And I further order, that the costs of this application and of the discovery shall be costs in the cause.

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## 56.—AFFIDAVIT IN OBEDIENCE TO ORDER FOR DISCOVERY.

I, \_\_\_\_\_, of \_\_\_\_\_, the above-named plaintiff [or defendant], make oath and say:—

1. That the documents hereinafter set forth are, to the best of my knowledge and belief, the only documents in my possession or power relating to the matters in dispute in this action, and the same are in my possession, viz.:—

A letter from \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_.

An agreement purporting to be between E. F. and G. H. dated \_\_\_\_\_.

2. I do not object to the production of the said documents, or any, or either of them.

[Or, I object to the production of the said documents [or if not to all, but to some of them, state which], on the following grounds; that is to say [here state the grounds of objection].]

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## 57.—INTERROGATORIES AFFIDAVIT.

We, A. B., \_\_\_\_\_ of \_\_\_\_\_, the above-named plaintiff [or defendant] and L. M., of \_\_\_\_\_, solicitor in this cause for the said plaintiff [or defendant], make oath and say, first,

And I, the said A. B., for myself, say—

1. That I believe I shall derive material benefit in this cause from the discovery which I seek by the interrogatories which I require to be delivered herein.

2. That I believe that I have a good cause of [or defence to this] action on the merits.

And I, the said L. M., say,—

3. That the plaintiff [or defendant] will derive material benefit by the discovery which he seeks by interrogatories.

4. That I believe that the plaintiff [or defendant] has a good cause of [or defence to this] action on the merits.

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## 58.—ORDER FOR AN ORAL EXAMINATION.

Upon hearing the parties, their attorneys or agents [or counsel] on both sides, I do order that the plaintiff [or defendant] do attend before the registrar of this court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to be by him orally examined as to the points mentioned in the paper writing hereunto annexed, the plaintiff's [or defendant's] answers to the interrogatories delivered to him in this action being insufficient in such points. [Add where any documents are to be produced: And I do further order that the plaintiff [or defendant] do produce to the said registrar at the same time and place the following documents [here describe them shortly].]

I further order that the costs of the examination, and of the proceedings herein, as may be taxed by the registrar, shall be paid by \_\_\_\_\_, [or shall abide the event, or as otherwise ordered].

## 285.—ORDER FOR INTERROGATORIES.

Upon reading the affidavit of \_\_\_\_\_, I do order that the \_\_\_\_\_ be at liberty to deliver to the \_\_\_\_\_ or his solicitor, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, interrogatories in writing upon the matters as to which discovery is sought in this action, and that the \_\_\_\_\_ do, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, answer the questions in writing by affidavit, and return such answers to me for filing.

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## 286.—ORDER FOR PRODUCTION OF DOCUMENTS.

Whereas \_\_\_\_\_, of \_\_\_\_\_, was duly summoned under a summons of this court dated the \_\_\_\_\_ day of \_\_\_\_\_ to produce at the trial of this action upon this \_\_\_\_\_ day of \_\_\_\_\_ the following papers and documents:—

[*Here set out documents contained in summons.*]

And whereas the said summons was duly served upon the said \_\_\_\_\_ upon the \_\_\_\_\_ day of \_\_\_\_\_:

And whereas the said \_\_\_\_\_ has failed to produce the said documents above set out, or any or either of them [*or has failed to produce the following document \_\_\_\_\_, being \_\_\_\_\_ of the documents above set out*]:

And whereas it has been proved to the satisfaction of this court that the documents above set out [*or the following documents \_\_\_\_\_, being \_\_\_\_\_ of the documents above set out*] are in the possession, power, or control of the said \_\_\_\_\_, and that they relate to the matters in dispute in this action:

It is ordered that the said \_\_\_\_\_ do on or before the \_\_\_\_\_ day of \_\_\_\_\_ produce and leave with the registrar of this court at his office situate at \_\_\_\_\_, the said following documents; namely,

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## 287.—NOTICE OF APPLICATION FOR FURTHER ORDER FOR PRODUCTION.

Let all parties concerned attend at \_\_\_\_\_ on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the forenoon on the hearing of an application on the part of \_\_\_\_\_, to consider the objection made by the affidavit of the \_\_\_\_\_ filed the \_\_\_\_\_ day of \_\_\_\_\_, pursuant to the order dated the \_\_\_\_\_ day of \_\_\_\_\_, to produce the document set forth in the second part of the first schedule hereto [*or as may be*].

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II. *Discovery in the Lord Mayor's Court.*

The practice of discovery in the Lord Mayor's Court is regulated by sections 50—54 of the C. L. P. Act, 1854 (see *post*, App. Ch. II.), applied to the Mayor's Court by Order in Council of November, 1863 (and therefore still in existence, though repealed quâ the Supreme Court, see *ante*, p. 6, and 46 & 47 Vict. c. 49), and by section 21 of 20 & 21 Vict. c. clvii, which is as follows:—"In any action or other legal proceeding in the court, the court may, on application made for such purpose by either party, compel the opposite party

to allow the party making the application to inspect all documents in the custody or power or under the control of such opposite party relating to such action or other legal proceeding, and if necessary to take examined copies of the same, or to procure the same to be duly stamped in all cases in which, previous to the passing of this act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the court."

The court still possesses its old jurisdiction on its equity side : see Candy's Mayor's Court Practice, pp. 61—63.

Under this equitable jurisdiction bills of discovery would be filed against garnishees for discovery of a defendant's property in their hands in aid of an attachment : see Van Heyth. I. 511 : so by a defendant for discovery in aid of his defence, where he pleaded to the jurisdiction : see *ibid.* 509.

See an instance of a bill of discovery in Chancery in aid of this court, *Mayor of London v. Byfield*, ante, p. 614.

## APPENDIX.

### CHAPTER I.

#### FORMS.

THE following is the form for interrogatories given in R. S. C. App. B. No. 6:—

In the High Court of Justice.  
Division.

Between A. B., plaintiff,  
and

C. D., E. F. and G. H., defendants.

Interrogatories on behalf of the above-named [*plaintiff* or *defendant* C. D.] for the examination of the above-named [*defendants* E. F. and G. H., or *plaintiff*].

1. Did not, &c.

2. Has not, &c.

&c. &c. &c.

[*The defendant* E. F. *is required to answer the interrogatories numbered* .]  
[*The defendant* G. H. *is required to answer the interrogatories numbered* .]

The following is the body of the form of order for delivery of interrogatories given in R. S. C. App. K. No. 16:—

Upon hearing                      and upon reading the affidavit of                      , filed the day of                      18                      , and                      , it is ordered that the                      be at liberty to deliver to the                      interrogatories in writing, and that the said                      do answer the interrogatories as prescribed by Ord. XXXI. rr. 8 and 26 of the Rules of the Supreme Court, and that the costs of this application be                      .

The summons for the order should be founded on this form : see the forms in Dan. Ch. F. 1703 : Chitty, F. p. 286.

See as to the form of order and summons therefor where the application is against a corporate or other body, *ante*, p. 79.

A form of affidavit is given in Chitty F. pp. 286—287, as being sometimes required on the application : it is that which was in use under the C. L. P. Act, 1854, and merely follows out the terms of section 52 of that act (see the section *post*, Ch. II.). See as to the nature of affidavit necessary under different circumstances *ante*, Bk. I. Ch. IV. Sects. I. and II.

For forms of interrogatories on various matters see the following cases.—

In action against directors for false representations in prospectus interrogatories by plaintiff as to the issue of it and the statements in it: *Villeboisnet v. Tobin*, L. R. 4 C. P. 184 (*ante*, p. 320). In action to recover commission on iron rails interrogatories by plaintiff as to the ordering and sending the rails, as to communications and interviews with other persons, as to the general custom of the trade: *Reio v. Hutchins*, 10 C. B. N. S. 829 (*ante*, p. 463). Interrogatories as to payments, receipts, expenditure: *Zychlinski v. Maliby*, 10 C. B. N. S. 838 (*ante*, p. 463). In action to recover debt interrogatories by executor as to alleged payment or settlement of accounts by defendant with testator: *Hawkins v. Carr*, L. R. 1 Q. B. 89: *Hills v. Wates*, L. R. 9 Q. B. 688: and see *Eade v. Jacobs*, 3 Ex. D. 335 (*ante*, pp. 456, 457). Interrogatories to a mortgagee as to exercise of power of sale and other dealings with it: *Moor v. Roberts*, 2 C. B. N. S. 671 (*ante*, p. 462). In action for seduction interrogatories by plaintiff as to the defendant's pecuniary means, and as to the seduction: *Hodsoll v. Taylor*, L. R. 9 Q. B. 79 (*ante*, p. 113). Interrogatories in Admiralty cause of bottomry: *The Minnehaha*, L. R. 3 A. & E. 148. In actions for slander interrogatories by plaintiff as to the words used: *Atkinson v. Fosbrooke*, L. R. 1 Q. B. 628 (*ante*, p. 463). Interrogatories by plaintiff as to instances of exercise of alleged right of common: *Commissioners of Sewers v. Glasse*, L. R. 15 Eq. 302 (*ante*, p. 452). In action on promissory note interrogatories by plaintiff to shew that a deed of arrangement by defendant under the Bankruptcy Act (relied on as a defence) was void, as to the names of the alleged creditors, their debts, &c.: *Bayley v. Griffiths*, 1 H. & C. 429 (*ante*, p. 461). In a similar action interrogatories by plaintiff to shew invalidity of the defendant's certificate of discharge from his bankruptcy: *Bartlett v. Lewis*, 12 C. B. N. S. 249 (*ante*, p. 462). In action to recover goods against shipowner, the defence being that they were lost by excepted perils, interrogatories by plaintiff as to the circumstances under which they were lost: *Bolckow v. Fisher*, 8 Q. B. D. 161: *Grumbrecht v. Parry*, 32 W. R. 203, 558: 49 L. T. 570 (*ante*, pp. 459—460). In action by indorsee of bill of exchange, the defence being that the acceptance was not the defendant's, interrogatories by plaintiff directed to this defence: *Morris v. Bethell*, L. R. 4 C. P. 765 (*ante*, p. 462). In action for negligence in making a valuation interrogatories by plaintiff as to the basis of valuation: *Turner v. Goulden*, L. R. 9 C. P. 57 (*ante*, p. 466). Interrogatories by defendant for the purpose of paying the proper amount into court: as to loss sustained by plaintiff through non-carriage of cargo: *Horne v. Hough*, L. R. 9 C. P. 135: as to solvency or insolvency of persons: *Dobson v. Richardson*, L. R. 3 Q. B. 776: as to injuries and loss sustained by plaintiff through an accident: *Frost v. Brook*, 23 W. R. 260 (*ante*, pp. 468—471). Interrogatories seeking discovery in the nature of particulars: *Saunders v. Jones*, 7 Ch. D. 435: *Lyon v. Tweddell*, 13 Ch. D. 375: *John v. James*, *ibid.* 370 (*ante*, pp. 452—453). Interrogatories by defendant as to the circumstances of indorsement of bill of lading to plaintiff: *Derby, &c. Bank v. Lumsden*, L. R. 5 C. P. 107 (*ante*, p. 462). Interrogatories by plaintiff as to circumstances of receipt of rentcharge by defendant claiming title thereto: *Towne v. Cocks*, L. R. 9 Ex. 45 (*ante*, p. 458). Interrogatories as to pedigree: *Wilson v. Hammonds*, L. R. 8 Eq. 326: *Kennedy v. Lyell*, 23 Ch. D. 387: *O'Connor v. Malone*, 1 Sau. & So. p. 524 (*ante*, pp. 528, 530, 534). Interrogatories by plaintiff (reversioner) in action of ejectment against person as assignee of lease for breaches of covenant: *Chester v. Wortley*, 18 C. B. 239 (*ante*, p. 529). Interrogatories by defendant in action of trover as to plaintiff's case, and the grounds of his claim: *Edwards v. Wakefield*, 6 E. & B. 462 (*ante*, p. 451). Interrogatories by defendant in action of ejectment: *Wallen v. Forrest*, L. R. 7 Q. B. 239: *Flitcroft v. Fletcher*, 11 Exch. 543 (*ante*, p. 534). Interrogatories to defendant who pleads "plene administravit:" *Peck v. Nolan*, 14 Ir. C. L. App. xxxii. For interrogatories in patent actions see cases referred to in Book III. Chap. I.

The following is the form of answers to interrogatories given by R. S. C. Appendix B. No. 7 :—

[*Heading as in Interrogatories, ante.*]

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows:—

The following are suggested as forms for the principal objections which can be taken to answering an interrogatory :—

(1) That in respect of the matter discovery of which is sought by the interrogatory I am willing (a) to deliver particulars, see *ante*, p. 91 : (b) to make admissions, see *ante*, p. 91 : (c) to produce documents for his inspection, see *ante*, pp. 91, 123.

(2) That the answering the interrogatory will entail (a) expense, (b) inconvenience, (c) trouble : see *ante*, pp. 298—299 ; and, see *ibid*, he can obtain the discovery easily, effectually, and cheaply, (a) aliunde, see *ibid*. : (β) by inspection of documents in my possession which I am willing to produce, see *ibid*. and *ante*, objection (1) : (γ) by admissions which I am willing to make, see *ibid*. and *ante*, objection (1) : (δ) by particulars which I am willing to give, see *ibid*. and *ante*, objection (1).

(3) That the interrogatory is (a) prolix, see *ante*, pp. 106, 110 : (b) oppressive, see *ante*, pp. 106, 110, 298 : (c) unnecessary, see *ante*, pp. 100, 106—107, 110 : (d) scandalous, see *ante*, p. 105, 110 : (e) irrelevant, see *ante*, p. 110 : (f) not bonâ fide for the purpose of the action, see *ante*, p. 110 : (g) not sufficiently material at this stage, see *ante*, p. 110 : (h) requires me to make what is in effect an affidavit of documents, see *ante*, p. 115 : inquires into what is matter of law, see *ante*, p. 115.

(5) That the discovery sought by the interrogatory is not clearly or sufficiently material at this stage, or is not clearly or sufficiently material to any question in this action, and, (see *ante*, p. 298), that the answering it (a) will entail expense, inconvenience, or trouble, see *ante*, p. 298 : (β) by disclosing my private means and transactions, or my trade secrets, or my private business and dealings with other persons, or the names of my customers, will prejudicially affect me, see *ante*, p. 300 : (γ) will expose me to a civil suit, see *ante*, p. 301 : (δ) by disclosing private and confidential communications by and to me to and by other persons, will prejudicially affect me, see *ante*, p. 301 : or these other persons, see *ante*, p. 302 : (ε) by disclosing the accounts, private affairs, dealings, names of the customers of my business will prejudicially affect those customers, see *ante*, p. 306 : (ζ) will expose other persons to civil or criminal or penal proceedings, see *ante*, p. 307.

(6) That the interrogatory is unreasonably wide and I have sufficiently answered it, see *ante*, p. 121.

(7) That I believe that answering the interrogatory might or would (see *ante*, p. 328) tend (a) to criminate me or expose me to the risk of a criminal prosecution (see *ibid*.): (b) to make me liable to a penalty : (c) to make me liable to a forfeiture ; see *ibid*. : see *ante*, pp. 322—328, as to the necessity of stating further matters to show the effect or tendency of the answer.

(8) That the interrogatory seeks to discover the evidence which I propose to adduce in support of my case, see *ante*, p. 446 : or the manner in which I



shall make out or shape my case, *qu.* see *ante*, p. 447: and not merely the nature of that case, or the facts on which I rely to establish it, see *ante*, pp. 446, 448; or that it seeks to discover not the material facts of my case, but the evidence of those facts, see *ante*, p. 141.

(9) That it is of a fishing nature, no foundation for it being laid by his pleadings, see *ante*, pp. 459—461.

(10) That it seeks to discover the names of my witnesses: *qu.* as to the proper form of this objection, see *ante*, p. 473.

(11) That my answer would not disclose anything tending to support his case, or to destroy or impeach my own case, but would disclose only my evidence, or the manner in which I shall make out or shape my case: see *ante*, objection (8): and *ante*, p. 486.

(12) (*Objections by a defendant in an action to recover possession of land or other property*, see *ante*, Bk. II. Ch. III. Pt. 3): (a) that the interrogatory seeks to discover matters relating solely to my title to the (*land or other property*), see *ante*, pp. 516, 527: (b) that my answer would not disclose anything tending to support the plaintiff's title or relating to his title, but would exclusively disclose the evidence of my own title, or matter relating solely to my own title, see *ibid.* and *ante*, objections (8) and (11).

(13) *As to interrogatories inquiring into the contents or nature of documents which the party would be entitled to protect from production under the rule which protects his own evidence*, see *ante*, p. 473.

(14) That I have no personal knowledge (see *ante*, pp. 128, 362, 364) of the matters inquired after: that such information as I have received in respect thereof has been derived from information (of a confidential nature, see *ante*, p. 362) procured by my solicitor acting professionally for me in that capacity, or his agents (see *ante*, p. 362) in and for the purpose of defending my title to the property the subject of this action, see *ante*, p. 360: or in contemplation of litigation on the part of persons claiming the property and for the purpose of enabling him to advise me and conduct my defence against such claims, see *ante*, p. 362: or for the purpose of this litigation, see *ante*, p. 364: or in view of litigation (*state what*, see *post*, p. 632 (13)), see *ante*, p. 361; or for the purpose of giving me legal advice and assistance (*qu.* whether the claim is good where the information has not been procured for the purpose of litigation, see *ante*, p. 361): see generally *ante*, pp. 359—365.

(15) That I have no knowledge information remembrance or belief on the matter, see *ante*, p. 127 (*this general form includes technically the particular assertions, post*): that there is no information thereon contained in any documents to which I have a right of access (*the expression "in my possession or power" is ambiguous*, see *ante*, pp. 134, 224), see *ante*, pp. 134—137 (*add perhaps in some cases "other than public documents to which he has the same right of access as myself," see ante, pp. 135, 142*): nor (*see as to where this assertion is necessary, ante, p. 141*) have the persons who acted as my agents or servants in the matter any knowledge remembrance or information thereon, see *ante*, pp. 138—141; the persons who acted as my servants or agents in the matter (a) are abroad, or are dead, see *ante*, p. 142: (b) are no longer in my employ or control, see *ante*, p. 142, and I do not know where they are, or they (*state any other reason*), and I therefore submit that I am not bound to communicate with them, see *ante*, p. 142: (c) refuse to give me any information thereon (*qu.*): or I have a right of access to documents containing information thereon, and I have attempted (*state how*) to get access thereto, but my (*partner, solicitor or agent, &c.*) has prevented (*state how*) me from getting such access, and I submit whether I am bound to take proceedings against him for that purpose: see *ante*, pp. 135—137.

(16) I believe that I wrote or received a letter to or from the said A. B. of about that date, or signed a document relating to (*the subject*) of about that date, or have seen or heard of a document relating to (*the subject*) of about

that date, but I have now no right of access to it or to any copy of it, and I cannot remember with exactness what were its contents, or was its purport, and I submit that it not being suggested that it is lost or beyond the jurisdiction of the court I should not be forced to state my imperfect recollection of it, see *ante*, pp. 130—132.

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For form of summons to set aside or strike out interrogatories, see Dan. Ch. F. 1706. The summons usually asks that the interrogating party pay the applicant's costs occasioned by the delivery of the interrogatories, as well as of the application. See *ante*, pp. 100—101.

For form of summons to have some issue or question determined before deciding the right to discovery or inspection under rule 20 (see *ante*, p. 24), see Dan. Ch. F. 1707.

For form of summonses for extension of time to answer, see Dan. Ch. F. 1708, 1709.

For form of summons, and order, to answer or answer further, see Dan. Ch. F. 1711, 1713, 1714: Chitty F. pp. 295—296: see *ante*, p. 145.

For form of summons, and order, for vivâ voce examination, see Dan. Ch. F. 1712: Chitty F. pp. 295—296: the interrogated party to pay the costs of the examination as well as of the application, and see *ante*, p. 146. The form in Chitty also directs production of documents on the examination, as under sect. 53 of the C. L. P. Act, 1854, *post*, p. 638.

For forms of summonses for orders, and orders, for dismissing the action, striking out the defence, or attachment, for non-compliance with an order for discovery of any kind, see Dan. Ch. F. 1715—1717: Archb. F. pp. 297—298: see *ante*, p. 583.

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For form of summons for an order for an affidavit of documents, see Dan. Ch. F. 1718: Chitty F. p. 269.

The following is the body of the form of order for an affidavit as to documents given by R. S. C. App. K. No. 17:—

Upon hearing

It is ordered that the                      do within                      days from the date of this order, answer on affidavit stating what documents are or have been in possession or power relating to the matters in question in this action, and that the costs of this application be                      .

For form of order in use in the Chancery Division, directing production for the purpose of inspection, on the examination of witnesses, and at the trial, see Seton, pp. 133—134: see *ante*, pp. 154, 180.

A summons may be taken out against several parties, though represented by separate solicitors: Dan. Ch. F. 1718, and p. 920. And one order may be made against them: see Seton, pp. 134—135: see *ante*, p. 87.

For form of summons against a corporate or other body, see Dan. Ch. F. 1718: Chitty F. p. 269. And an order: Seton, p. 135: see *ante*, p. 84.

The order may be limited to an affidavit of documents relating to a particular matter in question: see Seton, p. 136: rule 12, *ante*, p. 155.

For form of affidavit in support of summons, see Chitty F. p. 270.

The following is the form of affidavit as to documents given by R. S. C. App. B. No. 8:—

In the High Court of Justice,  
Division.

18 . B. No. .

Between A. B., plaintiff,  
and  
C. D., defendant.

I, the above-named defendant C. D. make oath and say as follows:—

1. I have in my possession or power (a) the documents relating to (b) the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*]. (c).

4. I have had (d), but have not now, in my possession or power the documents relating to the matter in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*]. (e).

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*]. (f).

7. According to the best of my knowledge, information, and belief, I have not now, and never had, in my possession, custody, or power, or (g) in the possession, custody, or power of my solicitors or agents, solicitor or agent, or (f) in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

This form is compulsory under the present rule: see *ante*, p. 221; but *qu.* whether schedules may not be still dispensed with as they were in *Bewicke v. Graham*, 7 Q. B. D. 400.

See this form modified for two or more deponents, and a corporate or other body; Dan. Ch. F. 1720; Chitty F. p. 274.

The following are suggested as forms for some of the principal objections which can be taken to producing documents:—

(1) That it relates solely to the question (*state the question*) or is material only in the event of the plaintiff's succeeding in getting a decree in this

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(a) See *ante*, p. 224. (b) See *ante*, pp. 182, 183. (c) See *post*, and *ante*, p. 230.  
(d) See *ante*, p. 222. (e) See *ante*, p. 193. (f) See *ante*, p. 224.  
(g) See *ante*, p. 225.

action, being (*state of what nature the document is*), and is therefore not material at this stage, see *ante*, pp. 186—190.

(2) That (a) (*as in objection (1)*), (b) it is not clearly material or necessary for the purpose of determining any question in this action; and its production would disclose (*adapt objections to answering interrogatories (5) (β) to (ζ)*) *ante*, p. 627).

(3) That its production would to the best of my knowledge information and belief tend (a) to criminate me or expose me to the risk of a criminal prosecution, (b) to make me liable to a penalty, (c) to make me liable to a forfeiture: *see the references to objection, (7), ante*, p. 627.

(4) That it evidences (see *ante*, p. 487) or relates exclusively to (see *ante*, pp. 482, 487, 491) my own title (see *ante*, p. 501) or case, and contains nothing tending to impeach (see *ante*, pp. 494, 498, 499, 516, *as to when this is necessary*) my own title or case, or (see *ante*, p. 494) to support the title (see *ante*, p. 501) or case of the (*party seeking discovery*).

(5) That in my opinion as head or secretary of the department the production of the document would be injurious to the public service: see *ante*, p. 547.

(6) That it was a confidential, see *ante*, p. 378, communication between myself, or the person (*qu. whether it is necessary to state who the person was*) who acted as my representative for the purpose of making or receiving such communication, see *ante*, pp. 398, 400, or my predecessor in title (*state who or how*), see *ante*, p. 386, and my, or his, solicitor acting professionally for me, or him, in that capacity, see *ante*, p. 372, with the object of enabling him to give or of giving me, or him, legal advice and assistance (*qu. whether in some cases it may be necessary or advisable to state the matters in respect of which it was given*, see *ante*, p. 373 to p. 377), see *ante*, pp. 368, 372, 373.

(7) That it was a confidential, see *ante* p. 378, communication from me to the person (*qu. whether it may not be necessary to state who, and see ante*, p. 422, *as to a co-defendant*) who acted as the medium of communication between myself and my solicitor for the purpose of communication to my solicitor acting, &c. (*as in objection 6*) with the object of enabling him to give me legal advice and assistance (see *objection 6*): see *ante*, pp. 398, 400; or a confidential communication from the person so acting as aforesaid to myself by the direction of my solicitor acting as aforesaid with the object of enabling him to give or of giving me legal advice and assistance, see *ante*, pp. 398, 400.

(8) That it was prepared by my (*state who*) on my behalf and by my direction (*qu. "solely," see ante*, p. 418) for the purpose of its being submitted to my solicitor acting, &c. (*as in objection 6*) with the object of enabling him to give me, &c. (*as in objection 7*): see *ante*, pp. 391, 399.

(9) That it was prepared by (*state who, and the nature of the document, in order to bring it within the principles discussed ante*, pp. 401—402) by the direction and for the use of my solicitor acting, &c. (*as in objection, 6*) with the object of enabling him, &c. (*as in objection 6*): see *ante*, pp. 401—402.

(10) That it was confidentially (see *ante*, p. 378) prepared by (*state who, and if an agent of the client, add, see ante*, p. 418, "who at the time of so preparing it was aware that it was a confidential one required for the purpose of submission to my solicitor") or was written to me, see *ante*, p. 416, or to my solicitor, or to (*state who*) by (*as ante*) for the purpose of giving to my solicitor acting, &c. (*as in objection 6*) information which he desired should be obtained with the object of enabling him to give me legal advice and assistance in reference to this action which was then commenced or anticipated or contemplated, see *ante*, p. 408, or in reference to (*state whether any other litigation, see ante*, p. 409), or in reference to litigation in which it was then anticipated or contemplated I should be engaged or engage arising out of (*state what, see ante*, p. 409, and *post*, *objection 13*): see *ante*, pp. 405, 413, 415, 421.

(11) That it was prepared confidentially (see *ante*, p. 378) by the direction of my solicitor acting &c. (*as in objection 6*), or at his instance and for his use, see *ante*, p. 413, for the purpose of obtaining evidence, see *ante*, p. 413, or information which might lead to the obtaining of evidence, see *ante*, pp. 406, 414, or information as to the evidence which could be obtained, see *ante*, pp. 406, 413, or information which he required in order to enable him to give me legal advice and assistance, see *ante*, pp. 413—414, in reference to (*state the litigation as in the last objection*): see *ante*, pp. 405—406.

(12) That it was confidentially (see *ante*, p. 378) prepared by my (*state who, and see as to an agent's objection 10*) on my behalf and by my direction (*qu. "solely," see ante*, p. 418) for the purpose of its being submitted to my solicitor acting &c. (*as in objection 6*) with the object of enabling him to give me legal advice and assistance in reference to (*as in objection 10*): see *ante*, pp. 415, 418.

(13) That it (*being a document previously in existence or photographs of tombstones or houses, or a copy of such document, or extract therefrom*) was obtained or made by my solicitor, or his clerk or confidential agent, or by (*state who*) instructed or employed by him, solely (*but qu. see ante*, p. 418) for the purpose of defending me from the claims of persons who had commenced legal proceedings against me for the recovery of the (*the land the subject of the action*): (*state the nature of the document: and of the litigation, see ante, objection (10)*; see *ante*, pp. 392—393): see *ante*, pp. 391—395. *Qu. whether or under what circumstances this objection is valid, where no litigation is anticipated, see ante*, p. 392, and *objection (14), ante*, p. 628.

(14) That it is not in my sole possession, but is in the joint possession of myself and A. B. and C. D., as partners (*or as the case may be, it being necessary to state the nature of the possession, and the names of the joint possessors, see ante*, p. 198): see *ante*, p. 194.

(15) That I have no property in it at all, and hold it merely as agent, see *ante*, p. 199, or trustee, see *ante*, p. 202, for A. B.

(16) That I have no property in it at all, it being the property of A. B. who lent it to me for a special purpose, see *ante*, pp. 207—208.

(17) That it is a copy of a document made under the following circumstances: the original is the property of A. B. who allowed me to make a copy of it, being the copy in question, on the understanding that the said copy was to be the property of the said A. B., and that I was to use such copy for a special purpose only: see *ante*, pp. 206—208.

(18) That though it is my sole property, it is in the actual possession of A. B. my solicitor or my agent (*or otherwise describe the possessor*) who refuses to give it up to me, and I submit whether I am bound to take proceedings against him for that purpose: see *ante*, p. 195.

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For form of summons to extend time for filing affidavit, see Dan. Ch. F. 1719: see *ante*, p. 220.

For form of summons to consider sufficiency of affidavit as to documents, see Dan. Ch. F. 1722: see *ante*, pp. 210, 232.

For form of summons for further affidavit as to particular documents, see Dan. Ch. F. 1723: for further affidavit as to particular documents and generally: Dan. Ch. F. 1724: for corresponding orders see Seton, p. 137: see *ante*, p. 218.

For form of summons for order dismissing action for non-compliance with order for affidavit of documents, see Dan. Ch. F.

1725 ; and see *ante*, p. 589 : for order, striking out defence for do., Dan. Ch. F. 1726 : for attachment, Dan. Ch. F. 1727 : for form of order for attachment, Seton, p. 141 ; see *ante*, p. 583.

The following is the form of notice to produce documents under Ord. XXXI. r. 16, given by R. S. C. Appendix B. No. 9 :—

[*Heading as in Affidavit of Documents, ante*, p. 630.]

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim or defence or affidavit, dated the*      *day of*      *A.D.*].

*Describe documents required.*

X. Y.

Solicitor to the

To Z.

Solicitor for

The following is the form of notice to inspect documents under Ord. XXXI. r. 17, given by R. S. C. Appendix B. No. 10 :—

[*Heading as ante.*]

Take notice that you can inspect the documents mentioned in your notice of the      *day of*      *A.D.* [*except the deed numbered*      *in that notice*] at [*insert place of inspection*] on Thursday next the      *inst.*, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the      *day of*      *A.D.* on the ground that [*state the ground*] :—

See the practice under these rules, *ante*, pp. 240—245.

For form of summons to have inspection postponed until after the determination of a preliminary question, see Dan. Ch. F. 1730 : see *ante*, pp. 24—25.

For form of summons for extension of time for production for the purpose of inspection, see Dan. Ch. F. 1731 : see *ante*, pp. 172—173.

For forms of summons for leave to seal up parts of documents, of corresponding order, and of affidavit in respect of the parts sealed up, see *ante*, p. 237.

For form of summons for order for production for the purpose of inspection, see Chitty, p. 279 : Dan. Ch. F. 1736 (directing also, see *ante*, p. 180, production at the trial and on the examination of witnesses) : against two or more parties, Dan. Ch. F. 1738, and see *ante*, p. 87.

For form of affidavit in support, see Dan. Ch. F. 1737 : Chitty F. p. 280.

The following is the body of the form of order to produce documents for inspection by R. S. C. Appendix K. No. 18 : (see *post* as to the insertions necessary to be made) :—

Upon hearing      and upon reading the affidavit of      filed the  
day of      18      , and

It is ordered that the      do at all seasonable times, on reasonable notice, produce at [*insert place of inspection*] situate at      , the following documents, namely      , and that the      be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and

extracts therefrom, at            expense, and that in the meantime all further proceedings be stayed, and that the costs of this application be

For form of order for inspection, including production on the examination of witnesses and at the trial, see Seton, p. 136, and *ante*, p. 180.

See as to the times of inspection Bk. I. Ch. V. Sect. III. (d) and a special order in *Mertens v. Haigh*, *ante*, p. 171.

See as to the place of inspection Bk. I. Ch. V. Sect. III. (a) (b) (c), a summons for varying place of inspection in *Prestney v. Mayor of Colchester*, *ante*, p. 173, the order in that case *ante*, p. 171, as to claiming leave to produce at a special place in the affidavit of documents *ante*, p. 173.

As to the persons who may inspect see Bk. I. Ch. V. Sect. VI.: see a special form of order in *Lindsay v. Gladstone*, *ante*, p. 178, and Seton, p. 138.

See as to taking copies Bk. I. Ch. V. Sect. IV.

See as to the costs of inspection Bk. I. Ch. V. Sect. V.

See as to stay of proceedings *ante*, p. 583.

For form of order for inspection embodying an undertaking not to use the documents for any collateral purpose see *ante*, p. 238.

For form of order giving to a plaintiff who had revived a suit the benefit of an order for inspection obtained by the original plaintiff see *Lindsay v. Gladstone*, *ante*, p. 178: Seton, p. 138.

For form of order for inspection overruling the party's objections see Seton, p. 139: or allowing some and overruling others Seton, p. 136.

For form of order for inspection of documents to be brought over from India on prepayment of expenses see *Lindsay v. Gladstone*, *ante*, p. 171: Seton, p. 138.



## CHAPTER II.

RULES OF ORD. XXXI. OF R. S. C. 1883, WITH THE OLD RULES OF THAT ORDER, AND THE SECTIONS OF THE CH. P. AND C. L. P. ACTS RELATING TO DISCOVERY, WITH REFERENCES TO THE PAGES DISCUSSING THEM.

RULE 1. In any action (pp. 10, 11) where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff (p. 61) may (pp. 94—95) at any time after delivering his statement of claim (p. 94), and a defendant (p. 61) may (pp. 94—95) at or after the time of delivering his defence (p. 95) without any order for that purpose, and in every other\* cause or matter (p. 572) the plaintiff or defendant, may by leave (pp. 91—93) of the court or a judge (p. 605) deliver (p. 607) interrogatories in writing for the examination of the opposite (p. 57) parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose (p. 149): provided also that interrogatories which do not relate to any matters in question (pp. 11—12) in the cause or matter shall be deemed irrelevant (pp. 108, 110), notwithstanding that they might be admissible on the oral cross-examination of a witness (pp. 105, 113).

See old rule 1, *ante*, p. 91.

Ch. P. Act, 1852, section 12 (p. 97). Within a time to be limited by a general order of the Lord Chancellor in that behalf (within eight days after defendant's appearance or time for appearance) the plaintiff, in any suit in the said court commenced by bill, may, if he requires an answer from any defendant thereto, file in the record office of the said court, interrogatories for the examination of the defendant or defendants, or such of them from whom he shall require an answer, and deliver to the defendant or defendants so required to answer, or to his or their solicitor, a copy of such interrogatories, or of such of them as shall be applicable to the particular defendant or defendants; and no defendant shall be called upon or required to put in any answer to a bill unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor, within the time so to be limited, or within such further time as the court shall think fit to direct.

Sect. 14 (p. 97). The answer of the defendant to any bill of complaint in the said court may contain not only the answer of the defendant to the interrogatories so filed as aforesaid, but such statements material to the case as the defendant may think it necessary or advisable to set forth therein, and such answer shall also be divided into paragraphs, numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation.

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\* Literally this would exclude the powers of giving leave to interrogate before claim or defence in actions founded on fraud or breach of trust.

Sect. 19 (p. 97). It shall be lawful for any defendant in any suit, whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross-bill of discovery, to file in the record office of the said court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories in like manner as if the same had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared; and the practice of the court with reference to excepting to answers for insufficiency, or for scandal, shall extend and be applicable to answers put in to such interrogatories: provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff, and, in suit commenced by claim, to the statements therein, and in any affidavit which may have been filed either in support thereof or in opposition thereto: provided also, that a defendant, if he shall think fit so to do, may exhibit a cross-bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

C. L. P. Act, 1854, s. 51 (pp. 5, 97—99, 111). In all causes in any of the superior courts by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them, by leave of the court or a judge, may at any other time deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate (p. 82) any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer (p. 77) omitting without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt (p. 586) of the court, and shall be liable to be proceeded against accordingly.

Sect. 52. (pp. 97—99.) The application for such order shall be made upon an affidavit of the party proposing to interrogate and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay: provided that, where it shall happen from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavits of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

R. 2. In deciding upon any application for leave to exhibit interrogatories the court or judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars (p. 91), or to make admissions (p. 91), or to produce documents relating to the matter in question, or any of them (pp. 91, 123).

This rule is new.

R. 3 (pp. 116, 592). In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably (pp. 100, 102) vexatiously (pp. 100, 102), or at improper length (pp. 106, 107, 121, 123), the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

[The old rule differed only in these respects: the court must inquire or cause inquiry to be made: the words "with or without an application for inquiry" were not in the old rule: instead of the words "paid in any event" was the word "borne."]

R. 4. Interrogatories shall ["may" in the old rule] be in the Form No. 6 in Appendix B. (p. 625) with such variations as circumstances may require.

R. 5 (pp. 77—84). If any party to a cause or matter ["action" in the old rule] be a body corporate or a joint stock company, whether incorporated or not, or any other (p. 77) body of persons, empowered by law to sue or be sued, whether in its own name or (p. 78) in the name of any officer or other person, any opposite (p. 57) party may apply for an order (p. 79) allowing him to deliver interrogatories to (p. 79) any member (pp. 78, 80) or officer (pp. 78, 81) of such corporation, company, or body, and an order may be made accordingly.

R. 6. Any (p. 108) objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous (p. 105) or irrelevant (p. 110), or not bonâ fide for the purpose of the cause or matter (p. 110), or that the matters inquired into are not sufficiently material at that stage (p. 110) or on any other ground (p. 110) may be taken (p. 108) in the affidavit in answer.

See old rules in place of rules 6 and 7, *ante*, p. 100.

R. 7. Any interrogatories may be set aside (pp. 100, 101) on the ground that they have been exhibited unreasonably (pp. 100—104) or vexatiously (pp. 100—104) or struck out (pp. 100, 105) on the ground that they are prolix (p. 106), oppressive (p. 106), unnecessary (p. 106) or scandalous (p. 105); and any application for this purpose may be made within seven days after service of the interrogatories.

See old rules in place of rules 6 and 7, *ante*, p. 100.

R. 8. Interrogatories shall be answered by affidavit (pp. 145, 597) to be filed within ten days (p. 143) or within such other time as a judge may allow (p. 143).

R. 9. An affidavit in answer to interrogatories shall unless otherwise ordered by a judge (p. 606) if exceeding 10 folios, be printed (pp. 125, 145) and shall be in the Form No. 7 in Appen-

dix B. with such variations as circumstances may require (p. 145).

[In the original rule the number of folios was 3 instead of 10, but it was subsequently altered to 10: instead of "shall be" it was "may be."]

R. 10. No exceptions shall be taken to any affidavit in answer, but the sufficiency (pp. 145—146) or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge (p. 606) on motion or summons (p. 145).

R. 11. If any person interrogated omits to answer, or answers insufficiently (pp. 109, 117, 145, 146, 584, 588) the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination (p. 146) as the judge may direct (p. 145).

[C. L. P. Act, 1854, sect. 53 (pp. 147, 148). In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party as to such points (p. 147), as they or he may direct before a judge or master, and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just.

Sect. 54 provided that such rule or order should have the same force and effect and be proceeded on as an order made under 1 Will. 4, c. 22.

Sect. 55 provided for the keeping of the depositions, for office copies, and for their use as under the 1 Will. 4, c. 22.

Sect. 56 empowered the judge or master to make a special report to the court touching the examination, and the conduct or absence of any witness or other person, and the court to institute proceedings or make orders on such report.

Sect. 57 provided that the costs of the application, and the rule or order and proceedings thereon, should be in the discretion of the court or judge making the rule or order.]

[Consol. Ord. XVI. r. 19 (p. 148). Upon a third answer being held to be insufficient the court may order the defendant to be examined on interrogatories to the points as to which it is held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories; and the defendant shall pay such costs as the court shall think fit to award.]

R. 12. Any party (p. 61) may, without filing any affidavit (p. 157), apply to the court or a judge (p. 605) for an order (p. 154) directing any other (p. 58) party (p. 61) to any cause or matter (p. 572) to make discovery on oath (p. 597) of the documents which are or have been (pp. 222, 224) in his possession or power (p. 224) relating to (pp. 182, 183) any matter in question therein. On (p. 158) the hearing of such application the court or judge may either refuse (p. 156) or adjourn (pp. 25—26, 158) the same, if satisfied that such discovery is not necessary (p. 156), or not necessary at that stage (p. 158) of the cause or matter,

or make such order, either generally or limited (pp. 158, 182, 183) to certain classes of documents, as may, in their or his discretion, be thought fit.

R. 13 (p. 221). The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form, No. 8, in Appendix B, with such variations as circumstances may require.

[Old rule 12. Any party may without filing an affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action.

The old rule 13 was the same as the present rule 13 except that the words were "may be" instead of "shall be."]

[See the sections of the Ch. P. Act and C. L. P. Acts dealing with production of documents *post.*]

R. 14 (pp. 152—153). It shall be lawful for the court or a judge (p. 606) at any time (pp. 158, 567) during the pendency (p. 606) of any cause or matter (p. 572), to order the production by any party (pp. 58—59) thereto, upon oath (pp. 62, 85, 597), of such of the documents in his possession or power (pp. 153, 191, 193) relating to any (pp. 153, 182, 183) matter in question in such cause or matter, as the court or judge shall think right: and the court may deal with such documents, when produced, in such manner as shall appear just.

[The old rule 11 was in the same terms except that the words were "action or proceeding" instead of "cause or matter."]

[Ch. P. Act, 1852, s. 18 (pp. 152, 156). It shall be lawful for the court upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

Sect. 20. It shall be lawful for the court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.]

C. L. P. Act, 1851 (ch. 99), s. 6 (pp. 9, 152, 156). Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped

in all cases in which, previous to the passing of this act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.

C. L. P. Act, 1854, s. 50 (pp. 9, 152, 156). Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate (pp. 77, 84), shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the court or judge may make such further order thereon as shall be just.

R. 15 (pp. 240—245). Every party to a cause or matter shall be entitled, at any time (p. 567) by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge (p. 606) that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

R. 16 (pp. 240—245). Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9 in Appendix B. with such variations as circumstances may require.

R. 17 (pp. 241—245). The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the



Form No. 10 in Appendix B. with such variations as circumstances may require.

R. 18 (pp. 241—245). If the party served with notice under rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the judge (p. 606) may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

R. 19 (p. 284). An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused.

This rule is new.

R. 20 (pp. 24—30). If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge (p. 606) may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[The old rule 19 was the same except that it was confined to actions, and did not extend to causes or matters generally.]

R. 21 (p. 583). If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge (p. 606) for an order to that effect, and an order may be made accordingly.

R. 22 (p. 587). Service of an order for interrogatories ("interrogatories" not in the old rule) or discovery or inspection made against any party or his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

R. 23 (p. 587). A solicitor, upon whom an order against any

D.

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party for interrogatories (“interrogatories” not in the old rule) or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

R. 24 (p. 600). Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, he may direct them to be put in.

The old rule applied only to the trial of an action or issue: and the words “or any part of an answer” and “or the whole of such answer” were not in it.

R. 25 (p. 592). In every cause, or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court or a judge (p. 606), be secured in the first instance, as provided by rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the court or a judge, or shall appear to the taxing officer, to have been reasonably asked for.

This rule is new.

R. 26 (p. 594). Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into court to a separate account in the action, to be called “Security for costs account,” to abide further order, the sum of 5*l.*, and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court, to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge (p. 606) shall direct. The party seeking discovery shall, with his interrogatories, or order for discovery, serve a copy of the receipt for the said payment into court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made.

This rule is new.

R. 27 (p. 594). Unless the court or a judge (p. 606) shall at or before the trial otherwise order, the amount standing to the credit of the “Security for costs account” in any cause or matter,

shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but, in the event of the court or judge ordering him to pay the costs of the cause or matter, the amount in court shall be subject to a lien for the costs ordered to be paid to any other party.

This rule is new.

R. 27a. If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, master, or chief clerk (as the case may be), may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the "security for costs account" in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter.

This rule is new (Oct. 1884).

R. 28 (p. 87). In any action against or by a sheriff in respect of any matters connected with the execution of his office, the court or a judge (p. 606) may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

This rule is new.



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